(22,379)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 163.

THE UNITED STATES OF AMERICA ON THE RELATION OF HERMAN KNIGHT, PLAINTIFF IN ERROR,

vs.

WALTER L. FISHER, SECRETARY OF THE DEPARTMENT OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Caption	1	1
Transcript from the supreme court of the District of Columbia	1	1
Caption	1	1
Petition	1	1
Exhibit "A"—Certificate of J. G. Wright, commissioner	5	5
"B"—Rules of practice in allotment contest cases	5	5
"C"—Letter from Frank Pierce, first assistant secretary, to Commissioner of Indian Affairs	11	11
Rule to show cause	14	14
Marshal's return	14	14
Motion to dismiss	14	14
Answer of Richard A. Ballinger, Secretary of the Interior	15	15
Amended petition	21	21
Stipulation as to answer	24	24
Stipulation as to exhibits	25	25
Replication	25	25
Joinder of issue	29	29
Notice of hearing	29	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 21, 1912.

	Original.	Print
Notice setting cause for hearing	30	30
Supplemental answer	30	31
Depositions	32	33
Deposition of D. F. Connolly	33	33
J. Robert Burnham	38	40
T. A. Cates	39	41
W. S. Mowris	42	45
Henry Steinberger	46	48
E. R. Perry	49	52
W. A. Martin	55	59
P. J. White	68	75
Plaintiff's Exhibit "A"—Plat	78	86
Stipulations as to depositions	79	87
Deposition of J. George Wright	80	88
D. H. Bynum	88	97
James M. Givens	95	105
John Roy	97	107
Motion to dismiss	99	109
Motion to strike supplemental answer	100	110
Notice of hearing	100	110
Order granting motion to hear J. W. Zevely and Edgar Smith	101	111
Order allowing answer to be filed *nunc pro tunc;* motion filed October 13, 1909, withdrawn; leave to demur granted and demurrer filed; motion of October 6, 1909, to dismiss petition withdrawn; demurrer overruled	101	111
Demurrer to supplemental answer	101	112
Replication to supplemental answer	102	112
Joinder of issue	103	113
Motion to set cause for hearing	103	113
Copy of patent	104	114
Order discharging rule to show cause; prayers of original and amended petitions denied; dismissing original and amended petitions with costs; appeal	106	116
Memorandum: $100 deposited in lieu of bond on appeal	107	117
Docket entries	107	117
Directions to clerk for preparation of transcript of record	108	118
Memorandum: Time in which to file transcript of record extended	109	119
Clerk's certificate	109	119
Motion to dismiss or affirm	110	120
Minute entry of submission of motion	112	121
Minute entry of argument	112	121
Opinion	113	121
Judgment	116	126
Order allowing writ of error	117	126
Writ of error	118	127
Bond on writ of error	119	127
Citation and service	120	128
Clerk's certificate	121	129

1 In the Court of Appeals of the District of Columbia.

No. 2138.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Appellant,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior.

Supreme Court of the District of Columbia.

At Law. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition, &c.

Filed July 16, 1909.

In the Supreme Court of the District of Columbia, —— Term, 1909.

51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

To the Honorable —— ——, Justice of said Court:

Your relator Herman Knight, respectfully states as follows:

2 He is a citizen by blood of the Cherokee Nation and enrolled upon the approved roll of citizens by blood of said Nation as No. 16,760, age 26, as of September 1, 1902, and as quantum of blood, ¼ Cherokee, as is more fully shown by a certifi-

cate from the Commissioner to the Five Civilized Tribes, which certificate is attached hereto, made a part hereof, and marked Exhibit "A."

As such citizen of the Cherokee Nation he is entitled to an allotment of land as provided by the Act of Congress approved July 1, 1902, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for disposition of townsites therein, and for other purposes."

On the 28th day of August, 1907, he made application to the Commissioner to the Five Civilized Tribes at the Cherokee Land Office to take in allotment the N. /2 of the S. E. /4 of the N. W. /4, and the S. W. /4 of the S. E. /4 of the N. W. /4 of Section 19, Township 20 North, Range 13 East, in the Cherokee Nation, now in the State of Oklahoma, and it appeared of record in the office of said Commissioner to the Five Civilized Tribes that on the 21st day of August, 1907, the said tract of land above described was selected by Maudie Waters to be taken as a tentative allotment for her minor child, Eva Waters. The right of the class of citizens of the Cherokee Nation to which Eva Waters belongs and the right of Eva Waters, to select an allotment of the lands belonging to the Cherokee Nation, is now the subject of litigation in the United States Court of Claims at Washington, D. C., or in the Supreme Court of the United States, and is not yet adjudicated.

Under the rules of practice in Cherokee allotment contest cases before the Commissioner to the Five Civilized Tribes and the Commissioner of Indian Affairs and the Secretary of the Department of the Interior, as approved by the Secretary of the Department of the Interior, it was incumbent upon your relator to proceed in the matter of the selection of his allotment as he did proceed as hereinafter set forth. A copy of said rules of practice is attached hereto, made a part hereof, and marked Exhibit "B."

When, on the 28th day of August, 1907, your relator appeared at the office of the Commissioner to the Five Civilized Tribes for the purpose of selecting the above described land as a portion of his allotment, he ascertained that the said described lands had been previously tentatively set aside for Eva Waters, and your relator then and there filed a contest against the said tentative selection.

Under the said rules of practice the said contract instituted in the office of the Commissioner to the Five Civilized Tribes was proceeded with, there, and on appeal before the Commissioner of Indian Affairs, and thereafter, on appeal from the Commissioner of Indian Affairs to the Secretary of the Interior. These various proceedings had touching the said contest culminated in a decision by the Secretary of the Department of the Interior on May 1, 1909, awarding the land above described to your relator, as may be seen by the decision rendered by said Secretary of the Department of the Interior on said day a copy of which decision is hereto attached and marked Exhibit "C."

3 On May 11, 1909, the Secretary of the Department of the Interior directed the Chief of the Cherokee Nation, whose duty it was under the Act of Congress approved July, 1902, to execute deeds, to execute a deed to the above described land to

Herman Knight and forward the same to said Secretary of the Department of the Interior for approval and delivery as is more fully shown by a telegram in words and figures as follows, to-wit:

"29 Ks HI C 89 Collect Govt.

Dn—WASHINGTON, D. C., *May* 11*th*, 1909.

Ryan, Acting Com'r, Muskogee, Oklahoma:

Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty five thousand dollars for use of Minor Waters, contestants given including fifteenth to make payment upon receipt of thirteen thousand more within time allowed forward entire twenty five thousand to department endorsed to Secretary when entire fund received by you. Prepare deeds to respective contestants and have them executed and forwarded here for approval report promised by wire.

FRANK PIERCE,
First Ass't Sec'y.

11.35 A. M.

Thereafter, and in response to the telegram above quoted the Commissioner to the Five Civilized Tribes advised the Secretary of the Department of the Interior of the due compliance by the relator with the terms of his said telegram and forwarded to the Secretary of the Department of the Interior a deed properly executed by the chief of the Cherokee Nation conveying to your relator the lands above described. Said deed has been approved by the Secretary of the Interior. The relator complied with all of the requirements imposed upon him by law.

Notwithstanding the due execution by the Principal Chief of the Cherokee Nation of the deed aforesaid conveying the title to the lands aforesaid to your relator, and notwithstanding the due approval by the Secretary of the Department of the Interior of said deed in conformity to the provisions of the Act of Congress of July 1, 1902; and, notwithstanding the fact that the Secretary of the Department of the Interior directed the Principal Chief of the Cherokee Nation to execute this particular deed; and, notwithstanding there is no discretionary power left in the Secretary of the Department of the Interior relative to said transaction, he refuses to deliver said deed to your relator properly recorded as provided by law.

Your relator is entitled to have the said deed delivered to him as aforesaid.

It is the duty of the Secretary of the Department of the Interior to so deliver said deed to this relator.

This relator has no other remedy than by mandamus.

4 After your relator had performed all of the acts necessary and prescribed by law and prescribed by the rules and regulations of the Interior Department touching the selection of lands in allotment in the Cherokee Nation, and after the 11th day of May, 1909, the Secretary of the Interior authorized and empowered

your relator to have his tenant proceed with the development of said above described premises for the purposes of prospecting for and producing oil and natural gas from the said lands. In accordance with the said authority your relator has procured his said tenant to go upon said lands and said tenant is now upon the said lands and has already laid out and expended large sums of money in prosecuting an effort to produce oil and natural gas from underneath the said premises.

Your relator further states as follows: The Secretary of the Department of the Interior has refused and still refuses to deliver the deed to your relator and has ordered other and further proceedings in the Department of the Interior relating to this subject-matter, and has misconceived the force and effect of the execution and approval of said deed. While it clearly appears that there remains in the Department of the Interior, and that there is left to the Secretary of the Department of the Interior no other or further duty touching this subject matter, save and except the purely ministerial duty of delivering the said deed to your relator, the said Secretary of the Department of the Interior asserts the right to refuse to deliver said deed to your relator upon the ground as your relator is informed and believes from official notices received from the Secretary of the Department of the Interior, that he, the said Secretary, still has supervision and control over the lands conveyed by said deed, and claims to have the right to yet allot said lands.

Wherefore your relator prays the granting of a writ of mandamus under the seal of this court directed to the said Secretary of the Department of the Interior, commanding him forthwith to deliver to your relator the said deed properly recorded as required by law in such cases, and to do and perform all such other acts and things in the premises as the law may require. And your relator asks all such other and further relief as may be right and just, and as in duty bound your relator will ever pray.

THOMAS WHITE,
Attorney in Fact.
ZEVELY, GIVENS & SMITH,
Att'ys for Pl'ff.

STATE OF OKLAHOMA,
Muskogee County, ss:

Thomas White, of lawful age, being first duly sworn according to law on his oath states: that he is the attorney in fact for the relator in the above petition for a writ of mandamus and that he knows the contents of said petition; and he states that the matters and things therein alleged are true in substance and in fact, save such things as are alleged upon information and belief and as to such matters, alleged upon information and belief he believes them to be true; and that he has signed the name of the said Herman Knight to the said petition as the act and deed of the said Herman Knight under the authority of a power of attorney of said Herman Knight.

THOMAS WHITE,
Attorney in Fact.

Subscribed and sworn to before me this 13 day of July, 1909.

CHESTER A. COWPER,
[SEAL.] *Notary Public.*

My commission expires Dec. 16, 1909.

EXHIBIT "A."

Department of the Interior.

Commissioner to the Five Civilized Tribes.

Cherokee Roll, Indians by Blood.

Number.	Name.	Age.	Sex.	Blood.	Census card No.
16760	Knight, Herman (age, twenty-six)	26	M.	¼	7017

This is to certify, that I am the officer having custody of the approved roll of citizens by blood of the Cherokee Nation and that the above and foregoing is a true and correct copy of that portion of said roll appearing at Number 16760.

Enrolled as of September 1, 1902.

P. O. Vinita, Oklahoma.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

L. B. A., *Clerk.*

Muskogee, Oklahoma,
July 13, 1909.

EXHIBIT "B."

Rules of Practice in Choctaw, Chickasaw, and Cherokee Allotment Contest Cases Before the Commission to the Five Civilized Tribes, the Commissioner of Indian Affairs, and the Secretary of the Interior.

Department of the Interior.

Commission to the Five Civilized Tribes.

MUSKOGEE, INDIAN TERRITORY, *March* 17, 1903.

The following Rules of Practice in Choctaw, Chickasaw and Cherokee Allotment Contest Cases, approved by the Department,
6 January 27, 1903, and March 9, 1903, are hereby promulgated for the information and guidance of all concerned.

THE COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*

Rules of Practice.

Initiation of Contests.

Rule 1. Contests may be initiated by or on behalf of an adverse claimant against any party by or for whom a selection of land has been made in the Choctaw, Chickasaw or Cherokee Nations, for any sufficient cause affecting the right of possession of the land in controversy, by selecting the same land, and by filing a complaint with the Commission to the Five Civilized Tribes at the land office in the Nation in which the land lies.

Rule 2. When the allottee is deceased the contest shall be brought against the heirs of such deceased allottee, and the complaint shall state the names of all the heirs. If the heirs, or any of them, are non-residents of Indian Territory, or unknown, the complaint shall set forth the fact and be corroborated with respect thereto by the affidavit of one or more persons.

Rule 3. The complaint must conform to the following requirements:

(*a*) It must be written or partly written and partly printed.

(*b*) It must describe the land involved.

(*c*) It must state the land office where, the date when, and for whom, the contestant selected said land.

(*d*) It must make party contestee the person who, by himself or through another, originally selected the land in controversy and state the date of such selection and by whom made.

(*e*) If the contestee is an infant or a person of unsound mind the complaint shall so state and shall also state the name of the guardian of such infant or person of unsound mind, if there be one, and if there be none the complaint shall state the name of the person having the infant or person of unsound mind in charge.

(*f*) It must set forth the facts which constitute the grounds of contest.

(*g*) It must be duly verified.

Notice of Contest.

Rule 4. At least thirty days' notice shall be given of all hearings before the Commission, unless by written consent an earlier day shall be agreed upon.

Rule 5. Notice of contest and summons must be made upon the blanks prepared and supplied by the Commission and must give a description of the land involved, state the time and place of the hearing, and, except in cases of notice by publication, have a copy of the complaint attached.

7 Servi[illegible]

Rule 6. Personal service shall [illegible] made in all cases where the party to be served is a resident of Indian Territory, except as provided in Rule 9 and shall consist in the delivery of a copy of the notice and summons to each of the contestees.

Rule 7. If the person to be personally served is an infant or a person of unsound mind, service shall be made by delivering a copy of the notice and summons to the guardian of such infant or person of unsound mind, if there be one. If there be none, then by delivering a copy to the person having the infant or person of unsound mind in charge, and also to the person who made the selection for such infant or person. And if the contestee is a prisoner, convict, aged and infirm person, or soldier or sailor of the United States on duty outside of the Indian Territory, service shall be made as herein otherwise provided, and a copy of the notice and summons shall also be served on the person who made the selection for such prisoner, convict, aged and inform person, soldier or sailor.

Rule 8. Personal service may be executed by any officer or person.

Rule 9. Notice may be given by publication only when it is shown by affidavit presented on behalf of the contestant, and by such other evidence as the Commission may require, that due diligence has been used, and that personal service cannot be made or that the person to be served is a non-resident of Indian Territory, or that the heirs of a deceased allottee against whom the contest is brought are unknown. The affidavit must also state the present post office address of the person intended to be served, if it is known to the affiant, and must show what effort has been made to obtain personal service.

Notice by Publication.

Rule 10. Notice by publication shall be made by advertising at least once a week for four successive weeks in some newspaper published in the nation where the land in contest lies. The first insertion shall be at least thirty days prior to the day fixed for the hearing.

Rule 11. Where notice is given by publication, a copy of the notice shall, at least thirty days before the day fixed for the hearing, be mailed by registered letter to each person to be notified at the last address, if any, given by him, as shown by the records of the Commission, and to him at his present address named in the affidavit for publication required by Rule 9, if such present address is stated in such affidavit and is different from his record address. If there be no such record address, and if no present address is named in the affidavit for publication, then a copy of the notice shall be so mailed to him at the post office nearest to the land. A copy of the notice shall also be posted in the land office where the contest is pending for a period of at least thirty days before the day fixed for the hearing, and still another copy
8 thereof shall be posted in a conspicuous place on the land for at least two weeks prior to the day fixed for the hearing.

Proof of Service of Notice of Contest and Summons.

Rule 12. Proof of personal service of notice of contest and summons shall be the written acknowledgment of the person served or

the affidavit of the person who served the notice, attached thereto, stating the time, place and manner of service.

Rule 13. Where service is by publication, the proof of service shall be a copy of the advertisement, with the affidavit of the publisher or foreman attached thereto, showing that the same was successively inserted the requisite number of times, and the date thereof. Proof of service by mail and by posting a copy of the notice on the land shall be the affidavit of the person who mailed the notice, with the post office receipt for the registered letter attached thereto, and the affidavit of the person who posted the notice on the land.

Dismissals.

Rule 14. Cases will be called for trial on the day and at the hour fixed for the hearing, and if the contestant makes no appearance the case will be dismissed for want of prosecution, in which event written notice of such action, by personal service or registered letter, shall be given by the Commission to the parties in interest or their attorneys.

Continuances.

Rule 15. A postponement of a hearing to a day to be fixed by the Commission may, for a valid reason, be allowed on the day of trial; and when the continuance is asked for on account of the absence of material witnesses, the party asking for the continuance shall file an affidavit showing:

(*a*) That one or more of the witnesses in his behalf is absent without his procurement or consent.

(*b*) The name and residence of each absent witness.

(*c*) The facts to which they would testify if present.

(*d*) The materiality of the evidence.

(*e*) The exercise of proper diligence to procure the attendance of the absent witnesses.

(*f*) That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed.

Rule 16. No continuance shall be granted on account of the absence of witnesses when the opposing party shall admit that the witnesses would, if present, testify to the statements set out in the motion for a continuance.

Trials.

Rule 17. Upon the trial of a contest the Commission will, in all cases when deemed necessary, personally direct the examination of witnesses in order to draw from them all facts within their
9 knowledge requisite to a correct conclusion of any point connected with the case.

Rule 18. Due opportunity will be allowed opposing parties, or their counsel, to confront and cross-examine the witnesses introduced by either party.

Rule 19. Upon the day originally set for hearing and upon any day to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing. When

testimony is taken in shorthand, the stenographer's notes must be written out and the written testimony then and there subscribed by the witness and attested by the officer before whom the same is taken, unless the parties, or their counsel, shall, by stipulation in writing, agree that the transcript of the stenographer's notes, duly verified, shall be considered the testimony of the witnesses with the same force and effect as if it had been signed by the witnesses.

Reinstatement, Rehearing, and Review.

Rule 20. Motions for reinstatement, after dismissal as provided in Rule 14, and for rehearing or review, must be filed within twenty days from service of notice of the final order or decision in case of personal service of said notice and within thirty days in case of service of said notice by registered letter, said motion first having been served on the opposite party or his attorney, either personally or by registered letter. The party on whom the motion is served will be allowed the same length of time after service of motion in which to file a reply, service thereof first having been had on the opposite party, or his attorney, either personally or by registered letter.

Rule 21. Motions for rehearing or review must be accompanied by an affidavit of the party or his attorney to the effect that the motion is made in good faith and not for the purpose of delay.

Rule 22. In case of failure to file a motion to reinstate, or for rehearing or review, within the time prescribed by Rule 20 the case will be regularly closed.

Proof of Service of Motions, Replies, etc.

Rule 23. Proof of personal service of motions, replies, etc., shall be the same as that required by Rule 12. Proof of service of motions, replies, etc., by registered letter shall be the affidavit of the person who mailed the letter, with the post office receipt therefor attached, and said affidavit shall state that the letter for which the receipt was given contained a copy of the original motion, etc., as the case may be. And in all cases of service by registered letter, the time allowed for filing motions, replies, etc., shall begin to run from the date of the post office receipt for said letter.

10 Witnesses.

Rule 24. All costs incident to the attendance of witnesses in proceedings in allotment contest cases shall be paid by the respective parties to the contest by whose request they have been subpœnaed.

Appeals to the Indian Office and the Department.

Rule 25. Appeals from the final order or decision of the Commission lie, in every case, to the Commissioner of Indian Affairs and from his decision to the Secretary of the Interior, and twenty days will be allowed for appeal and argument from date of service of notice of the decision in case of personal service, and thirty days

in case of service by registered letter. All appeals and arguments must be served on the opposite party, or his attorney of record, either personally or by registered letter, within the time allowed for appeal, and appellee shall have the same length of time after service of appeal and argument in which to file a reply and to serve the same or a copy thereof on the appellant or his attorney of record. When an appeal is considered defective the party or his attorney will be notified of the defect and if not amended within fifteen days from the date of service of such notice the appeal may be dismissed by the officer to whom the appeal is taken. [All appeals and arguments, and replies thereto, must be filed with the Commission for transmission to the officer to whom the appeal is taken.]* Notice of all decisions must be served upon the attorney of record, and time will begin to run from such notice.

Ruled out portion of Rule 25 amended, under Departmental instructions of November 7, 1905, as follows:

All appeals, and arguments in connection therewith, and replies thereto, must be filed in the office wherein the decision to be affected by such appeal was made, or in the office of the Commissioner to the Five Civilized Tribes for transmission to the office to which the appeal is taken.

Motions for Rehearings and Reviews.

[Rule 26. Motions for rehearing, or for review of decisions of the Indian Office, or of the Department, and replies thereto, must be served, and filed with the Commission, as provided in Rule 20.]*

Rule 26 amended under Departmental instructions of November 7, 1905, as follows:

Rule 26. Motions for rehearing, or for review of decisions of the Indian Office or of the Department, and replies thereto, must be served as provided in Rule 20, and filed within the time provided in that rule, in the office wherein the decision to be affected by the motion was made, or in the office of the Commissioner to the Five Civilized Tribes for transmission to the officer to whom the motion is addressed.

---

*[Matter enclosed between brackets erased in copy.]

11 EXHIBIT C.

(Copy.)

Department of the Interior,
Washington.

Office of Indian Affairs.

Received May 12, 1909.

WILLIAM J. TWIST, Contestant,
vs.
EVA WATERS, a Minor, Contestee;

also

HERMAN KNIGHT, Contestant,
vs.
EVA WATERS, Contestee.

The Commissioner of Indian Affairs.

SIR: The land involved in these cases is fifty acres of valuable oil land situate near Tulsa, Oklahoma. It is being drained and wasted by nearby wells on adjoining lands. Eva Waters is a minor child, born between the 1st day of September, 1902, and the 4th day of March, 1906. Through her father and mother she made application to the Department for an allotment of the entire fifty acre tract to her. Her application was contested by Twist, he claiming adverse to her the west twenty acres of the said fifty acres. Her application was also contested by Herman Knight, he claiming, adverse to her, the other thirty acres. The contestants and contestee are Indians belonging to the Cherokee tribe, each having a small quantum of Indian blood.

The act which went into effect on the 27th day of July, 1908, removed all restrictions from all three of these Indians. Therefore as soon as the land is allotted and patents are issued, the jurisdiction of the Interior Department ceases, and the property, to whomsoever it goes, whether contestants or contestee, is absolutely beyond the control of the Department. The Department retains jurisdiction solely for the purpose of perfecting the allotments, and preserving and protecting the land from waste, pending the final determination of the allotment and issuing of patents.

A trial was had in the case of Twist vs. Waters before the Commissioner to the Five Civilized Tribes, and he rendered judgment in favor of Twist. An appeal was taken from his judgment to the Commissioner of Indian Affairs, and his judgment was reversed. The case has been appealed to the Department and is now ripe for determination upon its merits.

No trial has been had in the case of Knight vs. Waters. It is

probable that many months would be consumed before a trial
12 could be had of this case upon its merits before the Commissioner to the Five Civilized Tribes and his decision rendered and an appeal then taken to the Commissioner of Indian Affairs, and an appeal then taken to the Department, which would finally determine the issue in the case. It is uncertain when this case could be determined upon its merits, and in all probability, in view of the value of the land and the great interest that has arisen over the particular land, it would be at least twelve months before the case could be finally determined upon its merits. No person can at this time foresee the outcome of the trial of this suit.

The immediate question to be determined is whether or not this Department will approve a relinquishment, by the minor through her guardian, of her rights in the controversies.

On the 6th day of April, 1909, there was filed with the Commissioner to the Five Civilized Tribes, in the case of Twist against Waters, a motion on behalf of Waters to be allowed to confess judgment in favor of Twist. In this motion, C. W. Waters and Maudie Waters, the father and mother of the minor child, acting as guardians of the minor, proposed that she be permitted to retire from the case upon payment for her use of the sum of $4800.

On the same day, to-wit:—April 6th, 1909, in the case of Knight against Waters, a motion was filed by the minor, through C. W. Waters and Maudie Waters, father and mother and guardian of the minor, to be permitted to confess judgment in favor of Knight upon payment for her use of the sum of $7200.

The Commissioner to the Five Civilized Tribes recommends that the proposed compromise be approved and that the girl receive the $12,000 and relinquish her claim to the entire fifty acres of land, provided no better offer can be obtained.

The merits of the controversy between the two contestants and the contestee have not been presented in this hearing for determination. Indeed, the case of Knight vs. Waters could not at this time be presented.

Mr. A. W. Clapp, an attorney of Muskogee, appeared a few days ago, representing the guardian of the minor, and contended that the offer of $12,000 should be accepted.

Mr. A. R. Serven, of the firm of McGowan, Serven and Mohun, appeared at the same time, claiming to represent the legal guardian of the minor, and contended that a better settlement than $12,000 could be secured for the minor. At the time of hearing the Department was, and now is, of the opinion that the offer of $12,000 should not be accepted, and so announced to the two attorneys, and to other attorneys who represented the interests of oil men in and around Tulsa.

Since the hearing, the Little Rock Oil Company, P. J. White, Thomas White and W. J. Lewis, through their attorney, J. W. Zevely, have offered to pay the minor $25,000 for a relinquishment of her claim and an award of the land to the respective contestants.

Since the hearing Mr. Serven has secured on behalf of the
13 legal guardian of the minor an offer from the Olympus Oil Company, which is embodied in full in a paper filed in the Department on the 8th day of May, 1909.

The questions for the Department to determine now are two (1) Will this minor child be permitted to withdraw? The uncertainty of the outcome of this controversy is so overbearing upon the Department that it concludes that a reasonable compromise of her rights should be accepted. (2) The next question, therefore, to determine is as to which of these two propositions before us should be approved by the Department.

By the first proposition the minor child gets $25,000 in cash. The only condition imposed is that the land should be awarded to the contestants instead of the contestee, and as I understand it the controversy has narrowed itself down to such narrow limits that it is simply a question as to which of the three parties may have the land. If the minor is to be permitted to withdraw, there is no legal objection standing in the way of awarding the thirty acres to Knight and the twenty acres to Twist, and patents be issued to them speedily. As to the second proposition, before it can be made effective it involves the determination of these cases upon their merits, which is, to say the least, an uncertain issue, and in the meantime the land is being wasted and drained.

I have therefore decided to approve the $25,000 proposition, to permit the child to withdraw her contest, and to award the land to Twist and Knight, respectively.

It seems to me that the Department ought, in so far as it can, to control and direct the disposition of the $25,000. I am therefore of the opinion that the $25,000 should be paid over to the Secretary of the Interior, as trustee, to be paid by him to a trust company as the guardian of the girl, if a proper one can be found, or if not, to such guardian as will be approved by the Department.

In accepting this offer the Department will insist that the fund shall not be diminished by any charges upon it for attorney fees.

Mr. Zevely's clients will be given up to and including the 15th instant to make the payment of the $25,000.

(Signed) FRANK PIERCE,
First Assistant Secretary.

May 10, 1909.

Endorsed on back as follows:

Land 36515-09.

Department of the Interior,
Office of Indian Affairs,
Washington, D. C.,
May 12, 1909.

Respectfully Referred to the Commissioner to the Five Civilized Tribes for appropriate action.

(Signed) JOHN FRANCIS, JR.,
Acting Chief Land Division.

14 *Rule to Show Cause.*

Filed July 16, 1909.

In the Supreme Court of the District of Columbia.

No. 51808. At Law.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

Upon consideration of the petition filed herein, it is this 16th day of July, 1909, ordered that the Respondent show cause on or before the 23rd day of July, 1909, why the writ of mandamus should not issue as prayed in said petition; Provided, a copy of this order is served on him within five days before said date.

JOB BARNARD,
Associate Justice.

Marshal's Return.

Served copy of the within rule to show cause on Richard A. Ballinger, Secretary of the Department of the Interior, by service on Frank Pierce, acting secretary.
July 16, 1909.

AULICK PALMER, *Marshal.*
S.

Motion to Dismiss.

Filed July 19, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

Now comes here the defendant, Richard A. Ballinger, Secretary of the Interior, and appearing specially for the purposes of this motion, and none other, *and* moves the court to dismiss the petition heretofore filed in the above-entitled cause for the following reasons:

15 I. Because the said petition or application is not verified by the affidavit of the applicant, as required by law.

II. For other defects apparent on the face of the petition.

OSCAR LAWLER,
Assistant Attorney General;
F. W. CLEMENTS,
Assistant Attorney,
Attorneys for the Defendant.

Messrs. Zevely, Givens & Smith, Attorneys for Plaintiff.

SIRS: Please take notice that the foregoing motion will be set down for hearing before Mr. Justice Wright, on Friday, the 23rd day of July, 1909, at 10 o'clock, a. m., or as soon thereafter as counsel can be heard.

OSCAR LAWLER,
Assistant Attorney General;
F. W. CLEMENTS,
Assistant Att'y,
Attorneys for Defendant.

Service of copy of foregoing motion and notice accepted this 19 day of July, 1909.

ZEVELY, GIVENS & SMITH,
Attorneys for Plaintiff.

Answer.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Frank Pierce, First Assistant Secretary of the Interior, and, in pursuance of law, acting as Secretary thereof in the absence of Richard A. Ballinger, Secretary of the Interior, while especially reserving to himself all benefit *to* any exception to the uncertainties and defects of the petition filed herein, and to the lack of jurisdiction in this court to grant a writ of mandamus compelling the performance by him of duties involving the exercise of judgment and discretion (such being the character of the act performance of which is sought by this proceeding), nevertheless to make answer to said petition, says:

1-5. He admits the allegations in the first five paragraphs of said petition.

16 6. He admits that a contest was instituted by relator in the office of the Commissioner to the Five Civilized Tribes, but he denies that any hearing thereon was had or testimony taken therein until long after May 10, 1909, or that any appeal, at that time or since, was taken, or that under the alleged rules of practice, the contest ever has been taken by appeal to the Commissioner of Indian Affairs, or the Secretary of the Interior. He denies that said, or any proceedings, either on May 1, 1909, or at any other time, or at all, culminated in a decision awarding said land to said relator, but on the contrary, alleges the fact to be that on May 10, 1909, said respondent announced that, in consideration of the facts then before him as such Acting Secretary of the Interior, he would, in due course of administration of the affairs of his office, in the absence of any facts which might thereafter develop to change said determination, award to said relator the right to select said lands under the provisions of the act of Congress of July 1, 1902. He admits that, on said May 10, 1909, he considered a question then and there presented, viz., whether or not he should permit the said Eva Waters to accept from the relator a large sum of money in consideration whereof she was to be permitted to withdraw from said contest.

7. He denies that, as in form alleged in the seventh paragraph of said petition, he directed the chief of the Cherokee Nation to execute a deed to the land in controversy to said relator and to forward the same to him for approval and delivery, and avers that what he did in this behalf is shown by his telegram, sent May 11, 1909, to the Acting Commissioner to the Five Civilized Tribes, a correct copy of which is as follows:

Ryan, Acting Commissioner, Muskogee, Oklahoma:

Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight, respectively, upon payment of twenty-five thousand dollars for use of minor Waters. Contestant given including fifteenth to make payment. Upon receipt of thirteen thousand more within time allowed forward entire twenty-five thousand to Department endorsed to Secretary. When entire fund received by you prepare deeds to respective contestants and have them executed and forwarded here for approval. Report progress by wire.

FRANK PIERCE,
First Assistant Secretary.
F. P.

O. B. chg.
G. R.

8. He admits, as averred in the eighth paragraph of said petition, that the Principal Chief of the Cherokee Nation did sign and execute a deed of the land in controversy to the relator, and that the same was forwarded to the Department of the Interior; but he denies that he has ever approved said deed, and avers that without his approval said deed is insufficient to pass any title to the land in controversy either out of the Cherokee Nation as such or of the reversionary interest of the United States in said land. He further denies that relator complied with all the requirements
17

imposed on him by law, and avers that long prior to May 10, 1909, relator had disposed of all his alleged interest in the land in controversy to a non-citizen of the Cherokee Nation, by a deed, as will hereinafter be more fully set forth, and that in consequence thereof relator, on said May 10, 1909, and at the time of filing this petition for the writ of mandamus, had no interest in the land in controversy, and was not entitled to the allotment thereof. And he further avers that he was unaware of the circumstances of this transfer of relator's interest on and for a long time after said May 10, 1909.

9. As to the allegations contained in the ninth paragraph, he admits that he refuses to deliver said deed to the relator "properly recorded as provided by law," but denies that the execution of the deed by the Principal Chief of the Cherokee Nation conveyed the title to the land in controversy to the relator; denies that he approved said deed either in conformity to the provisions of the act of Congress of July 1, 1902, or in any manner at all approved the same; denies that as in form alleged he directed the Principal Chief to execute said deed; and denies that no discretionary power was left in him relative to said transaction, all of which will be more fully hereinafter shown and set forth.

10. He denies that relator is entitled to have said deed delivered to him.

11. He further denies that it is his duty to deliver said deed to the relator.

12. As to the allegation in the twelfth paragraph of said petition, he is advised that the same presents merely a conclusion of law, which he need not answer.

13. As to the allegations in the thirteenth paragraph of said petition, respondent states that the facts are as follows: Upon announcing his permission that the contestee, Eva Waters, might withdraw from the contest, he did state that, when relator had made full payment of the stipulated sum, he might then enter into possession, and that he, respondent, would direct issuance of patent or deed for the land in controversy; and he avers that he was moved to such action by reason of representations made to him by relator's counsel that the lands in controversy were being rapidly drained of their oil deposits by operations on contiguous tracts; but he denies that he authorized relator's alleged tenant to proceed with development for the purposes of prospecting for and producing oil and natural gas from said lands. And as to the averment that said tenant has gone upon said lands and has laid out and expended large sums of money thereon, respondent says that he is without information other than in said petition contained and cannot answer, on belief or otherwise, whether said statement is true or otherwise. But he does aver that under the rules of practice obtaining in the Department of the Interior, in Indian affairs, thirty days are allowed from and after notice of a decision within which time to file a motion
18 for review thereof, and that on May 21, 1909, in the presence of counsel representing the said Eva Waters and the said Herman Knight and Wm. J. Twist, he announced to said counsel

that the said Eva Waters should have up to and including the 9th day of June, 1909, within which to file a motion for review of said order of May 10, 1909, and that counsel for said Eva Waters then and there gave notice that he would file and present such motion. If, in view of these premises, relator or any alleged tenant of his went on the land and did those things he alleges were done, he or they did so with knowledge that said order had not become final and at their peril.

14. He admits he has refused and still refuses to deliver said so-called deed to relator and as such Acting Secretary of the Interior he did order other and further proceedings relative to the subject matter hereof, as will more fully appear in his further answer; and this without any misconception of the force and effect to the so-called execution of said deed, which, as averred aforesaid, was not and never has been approved by your respondent. He denies that no other than a purely ministerial duty remained in him, after May 10, 1909, touching these premises, but, on the contrary, avers that his duties respecting the matters in controversy and said allotment of land are purely judicial, involving the exercise of official judgment and discretion, and, as such, are not controllable by the courts in mandamus proceedings.

Furthermore, and more fully answering the rule herein issued, to show cause why the writ of mandamus should not issue as prayed, he avers:

That the merits of the contest, i. e., whether relator (the contestant) or Eva Waters (the contestee) had the greater right to allotment of the land in controversy, were not considered in making the disposition of the case on May 10, 1909, aforesaid; that it was then represented to him that the said Eva Waters, through her guardian, desired to withdraw from said contest in view of the large sum of money offered for such withdrawal; that relator's counsel represented that the consideration offered was amply commensurate with the extent of her potential interest in said land; and that moved by such considerations he deemed that said Eva Waters' interests would be subserved by allowing such withdrawal. But immediately thereafter, respondent avers that he was advised by telegram from the parent and guardian of said Eva Waters that the latter protested against allowance of said withdrawal, the same having been induced by gross misrepresentations of the value of the land in controversy; that thereafter a motion to review the action of May 10, 1909, was in due course presented by said Eva Waters, through her attorneys; that counsel for relator then and there appeared generally for the relator, and neither raised nor advanced any objection as to your respondent's complete jurisdiction in the premises, or to his proceeding to entertain and give consideration to said motion for review; that by brief and argument said relator, by his counsel, appeared in opposition to the contentions, mainly as to the facts, made in behalf of said Eva Waters, and sought,
19 not by plea or objection to the authority or jurisdiction of respondent, but upon the merits, to induce denial of the said motion to review and reconsider the action of May 10, 1909; that

thereafter, and on June 24, 1909, the respondent being satisfied that the consideration offered for said withdrawal was inadequate, and that he had been misled in adjudging what the best interests of this Indian ward, said Eva Waters, required, he vacated said order of May 10, 1909, and thereafter directed that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, and thereafter directed that the money deposited on behalf of relator should be returned to the party depositing it. And he also avers that at no time did relator question his jurisdiction, but, on the contrary, submitted thereto. He avers that pursuant to his said order, the contest case wherein relator is contestant and said Eva Waters is contestee was duly proceeded with before said Commissioner to the Five Civilized Tribes and has not yet reached him for consideration in the due course prescribed by the rules of practice in such cases obtaining.

He avers that, under existing law, the Commissioner to the Five Civilized Tribes, under the direction of the Secretary of the Interior, is vested with exclusive jurisdiction to determine all matters relative to the allotment of lands in the Cherokee Nation, and that his duties thereunder are strictly judicial, and are not subject to control by a court of law in mandamus proceedings.

He further avers that, under the law relating to the allotment of lands in the Cherokee Nation, the Commissioner to the Five Civilized Tribes is directed to issue allotment certificates as evidence of the right of an allottee to the land selected as his allotment as a step preliminary to the issuance of a deed or patent thereto, and that no such certificate of allotment has ever been issued to said relator.

He further alleges that the Cherokee Agreement (act of July 1, 1902 (32 Stat., 716), provides (Sec. 59) that:

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in this patent.

He avers that under existing law no deed or patent is valid or sufficient to pass title until approved by him and recorded in the office of the Commissioner to the Five Civilized Tribes (Sec. 5, act of April 26, 1906), and that until title passes he has exclusive jurisdiction and control of all matters pertaining to such allotments; that his approval of such deed or patent is not a ministerial duty, but a duty requiring the exercise of judgment and discretion, involving a judicial determination of the rights of the applicant for patent to the lands involved; and that pursuant to his duty and his right, he has refused to approve a deed of the lands herein in controversy to the said relator, because, while acting within his jurisdiction, he has determined that, under the law governing allotments in the Cherokee Nation, said relator has not yet shown himself, by a trial of the contest case instituted by him against said
20 Eva Waters, to be entitled to take said land in allotment.

And he further says that his action of May 10, 1909, in so far as it affects relator was in part induced by a concealment of ma-

terial facts bearing upon relator's right, in any event, whether said Eva Waters did or did not withdraw from said contest, to take as his allotment the land in controversy. He avers that said relator, on or about April 15, 1909, for a consideration sold and disposed of all his alleged right, title, and interest in said land, to one C. C. Robert, who, he is informed and believes and therefore avers, is not a citizen of the Cherokee Nation or entitled to take an allotment of land therein. He is also informed and believes and therefore avers that said relator resides in Texas and that said contest for said allotment of land, as well as these proceedings for a writ of mandamus, have been and are maintained and prosecuted, not for the benefit of the nominal relator, but for others who are not entitled to an allotment in the tribal lands of the Cherokee Nation; and he suggests to the court that the name of Herman Knight, the nominal relator or applicant for this writ of mandamus, is not subscribed to said petition; that it nowhere appears, save by verification of said petition by one Thomas White, that the latter is, as asserted, the attorney in fact, duly authorized under a power of attorney from said Knight to sign said Knight's name to said petition or, in his behalf, to make this application for the writ of mandamus; and he further suggests that were such power of attorney forthcoming and in proper form produced, said verification of said petition by said Thomas White is not such verification required by the law in such case made and provided.

Wherefore, for the reasons and on account of the facts set forth in this return, it is respectfully submitted to the Court that this court is without jurisdiction in this proceeding for mandamus to consider the application of the relator or by mandate to control the discretionary action of your respondent.

And, having fully answered and made return to the rule to show cause, he prays that said rule be dismissed, with his reasonable costs and that he be discharged from further duty in answering thereunto.

OSCAR LAWLER,
Assistant Attorney General.
F. W. CLEMENTS,
1st Ass't Att'y.

FRANK PIERCE,
Acting Sec't'y of the Interior.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Frank Pierce, being first duly sworn, says that he is Acting Secretary of the Interior; that he has read over the foregoing answer by him subscribed, and knows the contents thereof; that the matters and things therein set out on his personal knowledge, he
21 knows to be true, and those set out on information and belief, he believes to be true.

FRANK PIERCE.

Subscribed and sworn to this 22nd day of July, 1909, before me,

EDWD. B. FOX,

[SEAL.] *Notary Public, D. C.*

Service above acknowledged this day.

BRANDENBURG & BRANDENBURG.
ZEVELY, GIVENS & SMITH.

Amended Petition.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia, — Term, 1909.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

To the Honorable Chief Justice and Associate Justices of said Court:

Your relator, Herman Knight, respectfully states as follows:

He is a citizen by blood of the Cherokee Nation and enrolled upon the approved roll of citizens by blood of said Nation as No. 16,760, age 26, as of September 1, 1902, and, as quantum of blood, ¼ Cherokee, as is more fully shown by a certificate from the Commissioner to the Five Civilized Tribes, which certificate is attached hereto, made a part hereof, and marked Exhibit "A".

As such citizen of the Cherokee Nation he is entitled to an allotment of land as provided by the Act of Congress approved July 1, 1902, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for disposition of townsites therein, and for other purposes."

On the 28th day of August, 1907, he made application to the Commissioner to the Five Civilized Tribes at the Cherokee Land Office to take in allotment the N./2 of the S. E./4 of the N. W./4, and the S. W./4 of the S. E./4 of the N. W./4 of Section 19, Township 20 North, Range 13 East, in the Cherokee Nation, now in the State of Oklahoma, and it appeared of record in the office of said Commissioner to the Five Civilized Tribes that on the 21st day of August, 1907, the said tract of land above described was selected by Maudie Waters to be taken as a tentative allotment for her minor child, Eva Waters. The right of the class of citizens of the
22 Cherokee Nation to which Eva Waters belongs and the right of Eva Waters to select an allotment of the lands belonging to the Cherokee Nation, is now the subject of litigation in the United States Court of Claims at Washington, D. C., or in the Supreme Court of the United States, and is not yet adjudicated. Under the

rules of practice in Cherokee allotment contest cases before the Commissioner to the Five Civilized Tribes and the Commissioner of Indian affairs and the Secretary of the Department of the Interior, as approved by the Secretary of the Department of the Interior, it was incumbent upon your relator to proceed in the matter of the selection of his allotment as he did proceed as hereinafter set forth. A copy of said rules of practice is attached hereto, made a part hereof, and marked Exhibit "B."

When, on the 28th day of August, 1907, your relator appeared at the office of the Commissioner to the Five Civilized Tribes for the purpose of selecting the above described land as a portion of his allotment, he ascertained that the said described lands had been previously tentatively set aside for Eva Waters, and your relator then and there filed a contest against the said tentative selection.

Under the said rules of practice the said contest instituted in the office of the Commissioner to the Five Civilized Tribes was proceeded with, there, and on appeal before the Commissioner of Indian Affairs, and thereafter, on appeal from the Commissioner of Indian Affairs to the Secretary of the Interior. These various proceedings had touching the said contest culminated in a decision by the Secretary of the Department of the Interior on May 10, 1909, awarding the land above described to your relator, as may be seen by the decision rendered by said Secretary of the Department of the Interior on said day, a copy of which decision is hereto attached and marked Exhibit "C".

On May 11, 1909, the Secretary of the Department of the Interior directed the Chief of the Cherokee Nation, whose duty it was under the Act of Congress approved July, 1902, to execute deeds, to execute a deed to the above described land to Herman Knight and forward the same to said Secretary of the Department of the Interior for approval and delivery, as is more fully shown by a telegram in words and figures as follows, to-wit:

"29Ks HI C 89 Collect Govt.

Dn—WASHINGTON, D. C., *May 11th*, 1909.

Ryan, Acting Com'r, Muskogee, Oklahoma:

Lands in twist and knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty five thousand dollars for use of Miner Waters contestants given including fifteenth to make payment upon receipt of thirteen thousand more within time allowed forward entire twenty five thousand to department endorsed to Secretary when entire fund received by you. Prepare deeds to respective contestants and have them executed and forwarded here for approval report promised by wire.

FRANK PIERCE,
First Ass't Sec'y.

1135 A. M."

23 Thereafter, and in response to the telegram above quoted the Commissioner to the Five Civilized Tribes advised the Secretary of the Department of the Interior of the due compliance by the relator with the terms of his said telegram and forwarded to the Secretary of the Department of the Interior a deed properly executed by the Chief of the Cherokee Nation conveying to your relator the lands above described. Said deed has been approved by the Secretary of the Interior. The relator complied with all of the requirements imposed upon him by law. The land here involved is of more than $10,000 in value.

Notwithstanding the due execution by the Principal Chief of the Cherokee Nation of the deed aforesaid conveying the title to the lands aforesaid to your relator, and notwithstanding the due approval by the Secretary of the Department of the Interior of said deed in conformity to the provisions of the Act of Congress of July 1, 1902; and, notwithstanding the fact that the Secretary of the Department of the Interior directed the Principal Chief of the Cherokee Nation to execute this particular deed; and, notwithstanding there is no discretionary power left in the Secretary of the Department of the Interior relative to said transaction, he refuses to deliver said deed to your relator properly recorded as provided by law.

Your relator is entitled to have the said deed delivered to him as aforesaid.

It is the duty of the Secretary of the Department of the Interior to so deliver said deed to this relator.

This relator has no other remedy than by mandamus.

After your relator had performed all of the acts necessary and prescribed by law and prescribed by the rules and regulations of the Interior Department touching the selecting of lands in allotment in the Cherokee Nation, and after the 11th day of May, 1909, the Secretary of the Interior authorized and empowered your relator to have his tenant proceed with the development of said above described premises for the purpose of prospecting for and producing oil and natural gas from the said lands. In accordance with the said authority your relator has procured his said tenant to go upon said lands and said tenant is now upon said lands and has already laid out and expended large sums of money in prosecuting an effort to produce oil and natural gas from underneath the said premises.

Your relator further states as follows: The Secretary of the Department of the Interior has refused and still refuses to deliver the deed to your relator and has ordered other and further proceedings in the Department of the Interior relating to this subject matter, and has misconceived the force and effect of the execution and approval of said deed. While it clearly appears that there remains in the Department of the Interior, and that there is left to the Secretary of the Department of the Interior no other or further duty touching this subject matter, save and except the purely ministerial duty of delivering the said deed to your relator, the said Secretary of the Department of the Interior asserts the right to
24 refuse to deliver said deed to your relator upon the ground, as your relator is informed and believes from official notices

received from the Secretary of the Department of the Interior, that he, the said Secretary, still has supervision and control over the lands conveyed by the said deed, and claims to have the right to yet allot said lands.

Wherefore your relator prays the granting of a writ of mandamus under the seal of this court directed to the said Secretary of the Department of the Interior, commanding him forthwith to deliver to your relator the said deed properly recorded as required by law in such cases, and to do and perform all such other acts and things in the premises as the law may require. And your relator asks all such other and further relief as may be right and just, and as in duty bound your relator will ever pray.

HERMAN KNIGHT.

BRANDENBURG & BRANDENBURG &
ZEVELY, GIVENS & SMITH, *Att'ys for Compl.*

STATE OF INDIANA,
Marion Co., ss:

Herman Knight, of lawful age, being first duly sworn according to law on his oath states; that he is the relator in the above petition for a writ of mandamus and that he knows the contents of said petition; and he states that the matters and things therein alleged are true in substance and in fact, save such things as are alleged upon information and belief he believes them to be true; and that he has signed the same as his free act and deed.

HERMAN KNIGHT.

Subscribed and sworn to before me this 21 day of July, 1909.
[SEAL.] LEW CAMPBELL,
Notary Public.

My commission expires March 11, 1917.

(Endorsed:) File. W.

Stipulation as to Answer.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

HERMAN KNIGHT, Pl'tffs,
vs.
BALLINGER, Sec'y Int., Def't.

It is hereby stipulated & agreed that the Answer as filed by the Def't herein may stand as an Answer to the Amended Complaint.

BRANDENBURG & BRANDENBURG.
ZEVELY, GIVENS & SMITH. *For Pl'ff.*
OSCAR LAWLER, *For Respondent.*

25 *Stipulation as to Exhibits.*

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

No. 51808. At Law.

U. S. ex Rel. KNIGHT, Petitioner,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, Respondent.

It is hereby stipulated and agreed that the Exhibits filed herein with the original petition and made a part thereof, shall be deemed and considered to be a part of the Amended Petition filed herein this 23d day of July, 1909.

BRANDENBURG & BRANDENBURG &
ZEVELY, GIVENS & SMITH,
Att'ys for Pl'ff.

OSCAR LAWLER,
Assistant Attorney General,
Att'y for Respondent.

Replication.

Filed July 28, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

For reply to the answer of respondent herein, relator states as follows.

Replying to paragraph six of said answer, relator states the fact to be that the Secretary of the Interior did, on May 10, 1909, award the land in controversy to Herman Knight and did, on May 10, 1909, permit and authorize Eva Waters to accept, and he, the said Secretary of the Interior, did accept from the relator a large sum of money in consideration whereof she was permitted to withdraw from said contest. Relator further avers that on subsequent dates to May 10, 1909, the Secretary of the Interior did confirm and approve the said decision of May 10, 1909.

Replying to paragraph seven of said answer, relator states the fact to be that the telegram as quoted in the answer of respondent erro-

neously uses the word "progress" in the last line of said tele-
26 gram before the signature; and said telegram should read: "promptly," instead of "progress."

Replying to that part of paragraph eight of said answer which avers that the relator herein, long prior to May 10, 1909, had disposed of all his alleged interest in the land in controversy to a non-citizen of the Cherokee Nation by a deed, relator denies that he had on said May 10, 1909, or at any time prior thereto, parted with his right to claim the same in allotment and states the fact to be that he now has, as he has always had, the right as a citizen of the Cherokee Nation, to claim said land as an allotment.

Further replying to said paragraph eight, relator states that he has not sufficient information to state as to whether or not respondent was, as he avers, unaware on May 10, 1909, of the alleged transfer by the relator of his interest in said lands.

Replying to paragraph nine of respondent's answer relator states that said paragraph nine is merely a conclusion of law.

Replying to paragraph thirteen of respondent's answer, relator states the fact to be that, at the time of the decision rendered by said Secretary of the Interior, relator was in lawful possession of the lands in controversy; that the Secretary of the Interior having fixed the price at which the minor Eva Waters would be permitted to withdraw and the lands patented to Herman Knight, authorized Herman Knight to proceed through his tenants with the prosecution of developments for oil and natural gas without waiting for the physical delivery to the said relator of a deed or patent to the land,—the only condition which he had to observe to authorize him to proceed with this development being the payment in full of the sum demanded by the Secretary of the Interior, towit: the sum of fifteen thousand dollars; that your relator paid said sum to the Secretary of the Interior for the benefit of said minor Eva Waters, and on May 13, 1909 your relator complied with said condition and immediately erected on said land derricks and other machinery necessary to the drilling for oil and natural gas, and said derricks and machinery were on said land and the work was being prosecuted prior to and on May 24, 1909.

Replying to paragraph fourteen of respondent's answer, relator states the fact to be that the Secretary of the Interior, to-wit: Frank Pierce, acting as Secretary of the Interior, as by law he was authorized to do, after due investigation, demanded of relator to pay into his hands for the benefit of Eva Waters a minor the sum of fifteen thousand dollars; that upon the payment of said sum he directed the Principal Chief of the Cherokee Nation to issue to said relator a patent or deed to the lands in controversy. Herman Knight complied with the condition and the Principal Chief executed the deed. Relator states that no discretionary act remains to the Secretary of the Interior and only the purely ministerial one of delivering the deed or patent to the relator.

Further answering paragraph fourteen of respondent's answer. relator admits that the question as to whether or not relator or Eva

Waters the minor contestee had the greater right to the allot-
27 ment of the lands in controversy was not decided on its merits and avers the fact to be that the disposition of the case made by the Secretary of the Interior on May 10, 1909 was in consequence of an investigation made by the Secretary of the Interior himself by means of which he arrived at a determination as to the value of the premises involved. Relator further avers the fact to be that the respondent was not moved to the action taken by him in this regard upon any representation made by counsel for relator but was moved solely and entirely to the action taken by him by investigations conducted upon his own account. Relator states the fact to be that he offered to pay for the benefit of said Eva Waters a minor the sum of seventy-two hundred dollars to procure her to withdraw her application to allot said lands and to permit your relator to allot them and that counsel for relator represented to the Secretary of the Interior, fully believing said representations to be true, that said sum of seventy-two hundred dollars was entirely adequate to warrant him in permitting the said Eva Waters to withdraw her application to allot said land; that the said Secretary of the Interior, not content with these representations, not satisfied with the sum tendered,—for himself investigated the proposition and after a full hearing, both by brief and oral argument, by testimony of experts offered by your relator, by the statements of government officials who examined the property, by reason of the Secretary's own investigation of the physical fact—having himself been on the premises in controversy—he decided that the sum offered was inadequate and demanded of your relator that he pay him the sum of fifteen thousand dollars in consideration of which he would permit the said Eva Waters to withdraw her filing and would issue to your relator a deed or patent to said land, and urged your relator to pay the same.

Further replying to paragraph fourteen, relator denies that any misrepresentations of any character were made to the parent and guardian of Eva Waters as to the value of the land in controversy.

Further replying to said paragraph fourteen, relator denies that the action sought to be taken by the Secretary of the Interior on June 24, 1909, looking to vacating the order of May 10, 1909 was taken in consequence of his having been misled by your relator or his counsel; but on the contrary avers the fact to be that the price which your relator paid for the benefit of said Eva Waters was made in consequence of the investigation made by the Secretary of the Interior himself; and further avers the fact to be that the consideration paid was entirely adequate and for the best interests of the minor, said Eva Waters.

Further replying to said paragraph fourteen, your relator states the fact to be that the money deposited on behalf of relator has not been returned to him; and as to whether or not the respondent directed the same to be returned to him, your relator is not sufficiently informed either to affirm or deny.

Further replying to said paragraph fourteen of respondent's answer, relator denies that he has not questioned the jurisdiction of

respondent to proceed further with said investigation, and
28 avers the fact to be that by telegram of date July 12, 1909, he advised the respondent of his purpose to file this suit in mandamus in this court on July 16, 1909. He further avers the fact to be that when said contest case of Herman Knight against Eva Waters was called for trial at Muskogee on the 16th day of July, 1909, that then and there by his counsel he protested against any further steps being taken touching said land, stating as the grounds of said protest that the land had already been patented to your relator and that the jurisdiction of the Department of the Interior touching said land had ceased.

Furher replying to said paragraph fourteen of respondent's answer, relator states that while under the law certificates of allotment may be issued to applicants for allotment of lands in the Cherokee Nation, he avers it to be the fact that the issuance of a certificate of allotment is not an essential and prerequisite step to the issuance of a patent.

Further replying to paragraph fourteen of respondent's answer, relator states that under the law governing allotments in the Cherokee Nation it is not necessary that a contest case once instituted should be tried to a final conclusion to entitle the applicant to have the lands in allotment, but that various forms of procedure obtain before the Commissioner of the Five Civilized Tribes and the Secretary of the Interior by means of which allotments may be selected and patents thereto issued; that your relator has, by the action of the Secretary of the Interior directing the Principal Chief to issue patent to him, become entitled and is entitled to have the same delivered.

Further answering said paragraph fourteen of respondent's answer, relator denies that the action of respondent taken May 10, 1909 was in any manner or in part induced by the concealment of any material facts bearing upon relator's right; he denies that on or about April 15, 1909, or at any time, for a consideration he sold and disposed of all his "alleged" right, title and interest in said land to one C. C. Robert or to any other person. Under the law he could not dispose of said land; and if any purported conveyance was made on April 15, 1909, it was not intended to be a conveyance in fee, but was merely intended to be and sought to be a mortgage; that since said date the said Robert has re-conveyed to relator all interest or purported interest which your relator sought by said conveyance of April 15, 1909 to convey to him.

Further answering said paragraph fourteen of respondent's answer, your relator states that it is immaterial where his citizenship may now be as affecting his right to take lands of the Cherokee Nation in allotment, and denies that he is a citizen of the State of Texas, and avers the fact to be that he is a citizen of the State of Oklahoma. He avers that his contest seeking to allot the land in controversy, as well as these proceedings for a writ of mandamus, have been and are maintained and prosecuted for his own benefit.

Relator further avers that the law requiring the Secretary of the

Interior to approve patents in order to divest the United States
29 Government of its reversionary interest does not prescribe the manner in which the formal approval shall be executed by the Secretary of the Interior.

Having fully replied to the answer of respondent herein, your relator respectfully prays that a peremptory writ of mandamus be issued against the said respondent requiring him to deliver to your relator a deed to said land, properly recorded, and for such other and further relief as to the Court may seem just, and for his reasonable costs.

BRANDENBURG & BRANDENBURG &
ZEVELY, GIVENS & SMITH,
Att'ys for Relator.

Joinder of Issue.

Filed July 30, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

The respondent joins issue upon the replication of the relator, Herman Knight, to respondent's answer to the rule to show cause.

OSCAR LAWLER,
Ass't Att'y Gen'l.;
F. W. CLEMENTS,
Attorneys for Respondent.

Service acknowledged July 30, 1909.

BRANDENBURG & BRANDENBURG,
Att'ys for Relator.

Notice of Hearing.

Filed July 30, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

To Brandenburg & Brandenburg, E. R. Perry, and Zevely, Givens & Smith, Attorneys for Relator:

Please take notice that on August 3, 1909, at 10 o'clock in
30 the morning, we shall ask the court that the issues joined in the above-entitled cause may be set for trial at an early date.

OSCAR LAWLER,
Ass't Att'y Gen'l.;
F. W. CLEMENTS,
Attorneys for Respondent.

Service accepted July 30, 1909.
BRANDENBURG & BRANDENBURG,
Att'ys for Pet.

Supreme Court of the District of Columbia.

TUESDAY, *August 3d*, 1909.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice, presiding.

* * * * * * *

No. 51808. At Law.

U. S. ex Rel. HERMAN KNIGHT, Petitioner,
vs.
R. A. BALLINGER, Sec'y, Respondent.

On motion of attorney for respondent, and for good cause shown, this cause is hereby set for hearing on the 2nd day of September, 1909.

Supplemental Answer.

Filed September 1, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now Frank Pierce as First Assistant Secretary of the Interior, and, in pursuance of law, acting as Secretary thereof in the absence of Richard A. Ballinger, Secretary of the Interior, and here reiterating, reaffirming and reasserting all, each and every of the matters and things set forth in his answer heretofore filed in the above entitled matter by way of supplemental answer, said petition alleges:

That heretofore and on the 19th day of July, 1909, the matter of the contest then pending before the Commissioner to the Five Civilized Tribes to determine the right as between the relator
31 above named and said Eva Waters to the land described in the petition herein came on regularly to be heard, the said relator having theretofore regularly appeared and been represented by counsel in said contest, and thereupon, and after the hearing of proofs and evidence in reference to the respective matters and issues raised in said contest, the Commissioner to the Five Civilized Tribes did duly and regularly, and in all respects in manner and form in accordance with law, decide said contest and the issues therein against the said relator and in favor of the said Eva Waters, and awarded said lands involved in said contest and described in said petition to the latter, and denied any right in the said relator thereto.

That under and in accordance with the rules and regulations of the said Department of the Interior, and pursuant to the regular practice in that behalf, said relator was allowed thirty days within which to appeal from the said decision of said Commissioner to the Five Civilized Tribes, but that said relator failed and refused to take any such appeal, or any proceedings to have reviewed the decision of the said Commissioner to the Five Civilized Tribes aforesaid, and said decision thereby, and upon the 18th day of August, 1909, became final and conclusive.

That thereafter, and on the 27th day of August, 1909, and in the ordinary course of its duty in the premises, said Department of the Interior, through the office of the Commissioner of Indian Affairs, delivered to the lawful guardian of the said Eva Waters, deed, duly executed by the persons and in the manner required by law, and duly approved by the said Secretary of the Interior, conveying unto

the said Eva Waters full and complete title in and to the real property described in the petition in the above entitled matter, and that said Eva Waters, minor as aforesaid, is now, and ever since the approval and delivery of said deed has been, the absolute and unqualified owner of said real property.

That by reason and on account of the execution and delivery of said deed as hereinabove set forth, the said Department of the Interior has not nor has any officer thereof, any power, authority, or jurisdiction over the land above described, nor has said Department of the Interior, or any officer thereof, any duty, right, or authority to execute or deliver, or cause to be executed or delivered, any conveyance covering the said property to the relator herein or to any other person.

Wherefore, respondent prays that he be hence dismissed and for his costs.

FRANK PIERCE,
Acting Secretary of the Interior.

OSCAR LAWLER,
Assistant Attorney General,
Attorney for Respondent.

F. W. CLEMENTS,
1st Ass't Att'y.

32 DISTRICT OF COLUMBIA,
City of Washington, ss:

Frank Pierce, being first duly sworn, says that he is Acting Secretary of the Interior; that he has read over the foregoing supplemental answer by him subscribed and knows the contents thereof; that the matters and things therein set forth on his personal knowledge he knows to be true, and those set forth on information and belief, he believes to be true.

FRANK PIERCE.

Subscribed and sworn to this first day of September, 1909, before me,

[SEAL.]

W. BERTRAND ACKER,
Notary Public in and for
the District of Columbia.

Depositions.

Filed September 2, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

At Law. No. 51809.

WILLIAM J. TWIST, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Be it known, that — an examination of witnesses begun and held on the 24th and 25th days of August, A. D. 1909, when the depositions hereto attached were taken, I, Guy L. Reed, a Notary Public in and for the state and county aforesaid, did cause to be personally present before me at the office of R. W. Kellough, at Tulsa, Oklahoma, the following named witnesses, viz: D. F. Connolly, J. Robert Burnham, T. A. Cates, William S. Mowris, Henry Steinberger, John Roy, E. R. Perry, W. A. Martin, and P. J. White, to testify on the part and behalf of the relator in a certain cause now pending in the Supreme Court of the District of Columbia, wherein the United States of America, on the relation of Herman
33 Knight and William J. Twist, respectively, is relator, and Richard A. Ballinger, Secretary of the Interior, is respondent; it being agreed by and between the parties that the testimony here taken shall apply to both causes Nos. 51808 and 51809; that the testimony shall be reported and transcribed by Giles A. Penick, instead of by the Notary Public; and that witnesses subpœnaed for the 25th of August may be examined on the 24th.

Present on behalf of the relator, Messrs. Zevely, Givens & Smith and Mr. E. R. Perry; and on behalf of the respondent, Mr. J. Carter Cook.

The witnesses above named, being of lawful age, were by me sworn before any question was put to them, to tell the truth, the whole truth, and nothing but the truth, relative to said cause, and thereupon the said witness deposed and said as follows:

D. F. CONNOLLY, being first duly sworn, deposes and says:

Direct examination.

By Mr. ZEVELY:

Q. State your name and age and occupation, please and residence.
A. David F. Connolly; age 50; occupation, oil producer.
Q. Residence?
A. Tulsa, Oklahoma.
Q. How long have you been engaged in the oil business, Mr. Connolly?
A. Over thirty years.
Q. Have you been engaged exclusively in that business?
A. Yes sir.
Q. In what branches of it?
A. The producing business.
Q. The producing business?
A. Yes sir.
Q. Buying, leasing and developing?
A. Leasing land, and buying and leasing and drilling wells, and having general charge of the developing business, more or less, all the time.
Q. This is a controversy, Mr. Connolly, wherein Herman Knight and William J. Twist, citizens of the Cherokee Nation by blood, seeking to mandamus the Secretary of the Interior requiring him to deliver to them patents to certain lands, those lands described as follows: The lands of Herman Knight are the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4 of Section 19, Township 20 North, Range 13 East in the Cherokee Nation, and the lands sought to be patented—to have the patent delivered to Twist, are described as the East 20 acres of Lot 2 of Section 19, Township 20 North, Range 13 East, in the Cherokee Nation. Are you familiar with the lands described?
A. I am.

Mr. ZEVELY: Mr. Notary, for the convenience of all parties, I will offer in evidence a plat showing the lands in controversy and lands immediately about the lands in controversy. Also, showing the wells that have been drilled in the immediate vicinity of the property involved in this suit. The white dots indicating producing wells. Let that plat be marked Exhibit A. (Plat marked.)

Mr. COOK: Respondent objects to the introduction of said map for it is not shown that it was made by competent surveyor,
34 nor does it show the date which said map was made, which would show the time that the wells supposed to be located around the land in controversy, were in operation.

Mr. ZEVELY: Plaintiff desires to say that we will hereafter, by competent testimony, show the authenticity of the map and the date of its making.

Q. Mr. Connolly, have you been upon the land which I have just described to you, recently?
A. Yes sir.

Q. You understand the situation with reference to the oil development in the immediate vicinity of the fifty acres involved in this controversy?

A. There has been some—probably three months since I was on the property. I was familiar at that time by actual observation. Since which time, I have only learned of the development by consulting maps.

Q. Mr. Connolly, I will ask you to direct your attention to the thirty acres first described, being the thirty acres sought to be taken by Herman Knight in allotment, and ask you what, in your judgment as an oil man, is the value of that thirty acres in fee, — from the encumbrance of any lease or mortgage, or incumbrance of any sort whatever?

Mr. COOK: On behalf of the respondent I object to the testimony as to the value of this land for oil production, for the reason that it has no bearing on the question involved in this mandamus proceeding.

Q. Answer the question, Mr. Connolly.

A. I believe the land would bring at the present time, possibly three hundred dollars per acre.

Q. That would be nine thousand dollars for the thirty?

A. Yes sir.

Q. And six thousand dollars for the twenty?

A. Yes sir.

Q. Mr. Connolly, on or about April 8th, 1909, what is your opinion as an oil man of the value of a lease on this fifty acres described above, considering that you were to pay a royalty of twelve and a half per cent?

A. On the two pieces, the fifty acres?

Q. Yes sir; or you may answer separately as to the thirty and twenty.

A. It would possibly command a bonus of seven or eight thousand dollars.

Mr. COOK: Is that answer as to April 8th?

Mr. ZEVELY: April 8th.

Q. That is the whole fifty?

A. Yes sir.

Cross-examination.

By Mr. COOK:

Q. You say you have not been upon this land for the last three months, Mr. Connolly?

A. I was out on the land at the time Mr. Pierce was here, on one corner of one piece, I think. I think it was in April.

Q. You haven't been there since that time?

A. No sir.

35 Q. Are your estimates as to the value of this land at the present time, based upon production that has been made on that land since you testified here in this proceeding April 8th, 1909?

A. I understand there is no production on the land.

Q. Upon what did you base your opinion that the lease on these lands at the present time is worth fifteen thousand dollars?

A. Because I believe people would pay that for it, if put up for sale.

Mr. ZEVELY: I will ask you to read that question again. I think the question stated fifteen thousand for the lease.

Mr. COOK: I understood him to testify——

Mr. ZEVELY: He testified he would pay fifteen thousand dollars for the fee.

Q. In your opinion, is this land worth more at the present time than it was in April?

A. It is not worth as much at the present time as it was in April.

Q. Why not?

A. There has been a great deal of oil taken out of the surrounding property since that time.

Q. Then, on that hypothesis, what would this land have been worth or the fee in this land, on April 8th, 1909?

Mr. ZEVELY: I object to that question as being incompetent, immaterial, and irrelevant.

Q. Answer the question, sir.

A. Put the question, please.

Q. Read the question (question read).

A. Do you have reference now to the land in fee?

Q. Yes sir.

A. Outright?

Q. Yes sir.

A. The land might have brought in April, fifteen or twenty thousand dollars, had it been——

Q. How much?

A. Fifteen or twenty thousand dollars.

Q. You testified that it was worth fifteen thousand now, did you not?

A. Yes sir. I didn't testify—I said it would bring that if it were sold, I think, at public sale.

Q. Would this—this land would only be valuable for oil purposes, would it not, Mr. Connolly?

A. It would have some agricultural value.

Q. What do you think that land would be worth for agricultural purposes?

A. Possibly be worth twenty-five dollars an acre or thirty dollars an acre.

Q. How much of it is subject to cultivation?

A. I cannot say. When I looked at the land, I was not estimating its agricultural value, and didn't consider that part of it.

Q. There is a big gulley or creek running through it, is there not?

A. Yes, but it doesn't cover all—I think that in itself would indicate it was more valuable—than upland.

Q. Did you mean to testify when you say it is worth fifteen thousand dollars for the fee, that that would be a fair valuation of Eva Waters' — in this land?

A. At the present time?

Q. Yes.

A. That is more than I would pay for it individually.

Q. You testified that would be worth——

A. I said would bring that if sold.

36 Q. You think it worth less than when you testified in April?

A. Very much less.

Q. April 8th, 1909, you testified in this proceeding that you thought ten thousand dollars would be a good price for Eva Waters' interest, and that twelve thousand dollars for it seemed a very good offer, did you not?

A. I think so still, and it was more than I would have paid for it at that time as an individual; but that don't say that is what the land would probably *brought* if put up for the highest bidder.

Q. Are you an individual oil producer? Or are you associated——

A. I am associated with a company; officer and stockholder.

Q. Have you any interest in companies having interests contiguous to this fifty acres?

A. No sir; our nearest production is probably six miles; have one small well probably six miles away.

Q. You have no direct or indirect interest in any companies or leases around this property?

A. We have some unanalyzed stuff about four miles from this property, but I have no interest whatever either directly or indirectly in the oil with anybody connected with this suit, to my knowledge.

Q. Have you any interest or hold any stuff in the following companies: The Highland Company; the Los Angeles Cherokee Oil Co.; Little Rock Oil Company; the Alpine Oil Co., or the Justin Oil Company?

A. No sir; I have no interest whatever in any of those companies.

Q. Where have you been since you testified here last, in April, Mr. Connolly?

A. I have been nearly altogether in Oklahoma; I have been east one trip; far east as New York City.

Q. When were you east?

A. In June.

Q. How long were you there?

A. I was about four or five days; I was ten days out of Oklahoma.

Q. What time was that in June?

A. I can't give you the exact dates from memory.

Q. Well, just approximately.

A. Well, it was before the middle of the month, as I remember it.

Q. You have been here in Tulsa and vicinity all the other time, since April?

A. Yes, sir, except when I took a trip through the field or over to Muskogee, outside of town.

Q. Have you done any work for any of the companies I mentioned heretofore?

A. No, sir.

Q. Not employed in any capacity with them?

A. No, sir.

Q. You are an expert oil man, are you Mr. Connolly?

A. Well, I have been working at the business all of my life, or since I was able to work; about thirty-two years; filled every position from roustabout to manager of——

Q. What is the effect of the draining of sixteen or more wells immediately surrounding land of this character?

Mr. ZEVELY: We object to that as incompetent, irrelevant, and immaterial.

Q. Answer the question.

A. They would take a great deal of oil from under this
37 land, if they have been down for sometime, they certainly would be drawing from under this land.

Q. Do you know how many wells there are immediately surrounding this land?

A. I counted those wells, when I was out there last April, but I cannot recollect now, but consulting a map, I note there is about seventeen around the border here.

Q. They range from a distance of twenty-five to one hundred and fifty feet from the line, do they not?

A. I understand some of them are very close to the line; so close, that—well, right on the line; others are back two hundred feet.

Q. Do you know about what the daily production of these wells are?

A. No, sir, I cannot tell you.

Q. They average about two hundred barrels per well?

A. I don't know.

Q. Do you know whether or not other wells have been drilled in there since April?

A. Yes, sir, I have been driving out that road within sight of that property, and I have noticed drilling wells, and I understand from the monthly reports that I scan very closely that there has been wells drilled up there; and the general report that the wells were very good to the north of this property on the adjoining property; heard them so reported as being very good wells.

Q. Do you know whether or not there are any wells in operation on this particular fifty acres?

A. I don't know whether there are any wells in operation on it.

Q. Had you any reason for having more than a casual interest in noticing these wells, Mr. Connolly?

A. Now, just put that question—I don't understand what——

Q. Read the question (question read).

A. I went on the property purposely to look it over in April, for the purpose of estimating the—looking at the development that had been made, and, going out later with Mr. Pierce—he went out there to see a well flow on the adjoining property, close to the line and

this property; that was the only time I ever went near the property and noticed the development that was made, although I have heard the property discussed. Read about the litigation and heard people discuss the conditions there, and from that way became somewhat familiar from hearsay.

Q. That the only reason you took particular notice of it?

A. I was asked to see what development was made there.

Q. By whom?

A. By Mr. White.

Q. Do you know for what purpose Mr. White asked you to notice the development on this land?

A. He wanted to get my opinion as to the value of the property, I think.

Q. When was that?

A. Last April.

Q. Before you testified here in the former hearing?

A. Yes, sir.

Redirect examination.

By Mr. ZEVELY:

Q. Mr. Connolly, you went out to this lease—to this property in controversy, with Assistant Secretary Pierce, did you?

A. Yes, sir. Now that—I don't think we were on this
38 property, but very close to the edge of the adjoining property.

Q. How near were you to it?

A. Must have been a couple hundred feet.

Q. How long were you out there?

A. Probably five minutes; we were pressed for time to make a train, and merely got on top of a tank and saw it flow, about a minute; got off the tank and got in an automobile, and flew for the train. While there Mr. Pierce made some inquiry about the surrounding, or spoke something about the surrounding property.

Q. Made inquiry about the wells around there?

A. Yes sir.

Q. What they were producing, etc.?

A. I think something was spoke about the production, as well as I remember.

Cross-examination.

By Mr. COOK:

Q. You were there with Mr. Pierce about a minute?

A. On the top of one of the tanks.

Q. Where was that tank located?

A. I think on the adjoining property. We got in off of this road and went into a well about this well here.

Q. As a matter of fact, you couldn't see all of that land from the place, could you?

A. From the top of that tank you could see about all of it. And as you approach from the road, you can see over the land.

Redirect examination.

By Mr. ZEVELY:

Q. Mr. Connolly, you have testified in response to a question here, that you went out there at the instance of Mr. White. I will ask you whether or not you didn't go with Mr. White and if he didn't tell you what wells were producing there so that you could fix an estimate of the value of the property?

A. Yes, sir.

Q. That is how you reached that conclusion?

A. Yes sir.

Recross-examination.

By Mr. COOK:

Q. What White was that you went out there with?

A. P. J. White.

Q. He is the lessee in this Knight property?

A. Yes sir.

DAVID F. CONNOLLY

J. ROBERT BURNHAM, being first duly sworn, upon his oath, deposes and says:

Direct examination.

By Mr. ZEVELY:

I will state, first, I offer Mr. Burnham's testimony for the sole purpose of establishing the fact that he is the man who made
39 the map of the lands involved, which has been offered as an exhibit, and I want to show by him the time of making it, and his competency to make the map. His name is not in any of your lists, and no notice of our taking his testimony.

Mr. COOK: I object on behalf of respondent, for the reason that no notice has been given that this party's testimony would be taken, and no stipulation entered to the effect that it would be taken.

Q. What is your occupation, Mr. Burnham?

A. Civil engineer and surveyor.

Q. What is your age?

A. Thirty-eight.

Q. How long have you been engaged in the business?

A. Since from twelve to fourteen years old.

Q. That would be about twenty-four years. Mr. Burnham, I have offered here in evidence a map marked—entitled a complete map of north Tulsa Oil Field, which is here shown to you. Did you make that map?

A. Yes sir.

Q. Is that an accurate map of the lands it purports to represent as having been surveyed by you and platted?

A. Yes sir.

Q. Does this map show accurately the oil wells which are drilled upon the lands covered by this map?

A. Yes sir, practically so.
Q. How were they indicated?
A. Indicated by white dots on here, and one place up here with a circle; that should have been whited in.
Q. Surveying is your business?
A. Yes sir.
Q. You follow that as an occupation?
A. Yes sir.

Mr. COOK: Stand aside.

J. BOBB BURNHAM.

T. A. CATES, being first duly sworn, upon his oath, testified as follows:

Direct examination.

By Mr. ZEVELY:

Q. What is your name?
A. T. A. Cates.
Q. What is your age?
A. Forty-four.
Q. Where do you live?
A. Lenapah, Oklahoma.
Q. What is your occupation?
A. Farmer, principally.
Q. Are you a member of the Cherokee Tribe of Indians?
A. No sir.
Q. Are you an intermarried citizen?
A. Yes sir.
Q. Do you know Charles Waters?
A. Yes sir.
Q. Where does he live?
A. He lives at Westville, Oklahoma.
Q. State whether or not, if you know, he has a minor child named Eva Waters?
A. He has.
Q. Did Mr. Waters ever consult you or converse with you relative to the value for oil purposes of a certain fifty acres of land upon which contests had been instituted by Hermann Knight upon thirty acres and William J. Twist upon twenty acres of it, described, the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4 of Sec. 19, Township 20 North, Range 13 East, in the Cherokee Nation, Indian Territory?
A. Yes sir.

Mr. COOK: To which respondent objects as irrelevant, incompetent, and immaterial, and as having no bearing upon the issues in this proceeding.

Q. Answer the question, Mr. Cates.
A. He did.
Q. Did you give him an opinion as to the value of his child's

interest in that land, considering that there was a lease upon it which carried one-eighth royalty, having in mind the proposition that if he were to relinquish that filing altogether and receive a sum of money in lieu of it, what sum he ought to receive for the benefit of the minor for this fifty acres?

Mr. Cook: Respondent objects for the reason that the question is irrelevant, incompetent, and immaterial, and further ask- that the question be stricken from the record for the reason that it is leading and places the answer in the witness' mouth.

A. Yes sir.
Q. What value did you place on it?

Mr. Cook: Objected to for the same reason.

Q. Answer the question.
A. Well, I told him that he could afford, I thought, to relinquish for twelve thousand dollars for the child.
Q. The entire fifty acres?
A. Yes sir.
Q. Did he come to you voluntarily?
A. Yes sir.
Q. Did you ever make any suggestion to him with reference to compromising his child's interest in this land prior to the time he came to you in regard to it?
A. No sir.

Mr. Cook: Objected to as incompetent, irrelevant, and immaterial.

Q. Did you have any subsequent conversations with Mr. Waters about this?
A. No, sir.

Cross-examination.

Mr. Cook:

Q. Where did you say you live, Mr. Cates?
A. Lenapah, Oklahoma.
Q. Where have you been since last April?
A. Principal part of my time I have been at home.
Q. Haven't been out of Oklahoma since that time, have you?
A. Yes, sir, I have been at Coffeyville, Kansas.
Q. Just over the line?
A. Just over the line.
Q. For a day or two?
A. Oh, no, go up and come back the same day.
Q. Mr. Cates you testified you are a farmer?
A. Yes, sir, have been.
Q. You are not an expert oil man? You are not an oil man?
A. No, sir.
Q. Lenapah is up above Nowata, isn't it?

A. Yes, sir, 12 miles.
41 Q. How far is that from Tulsa?
—. About forty miles, I expect; thirty-six or forty.
Q. How much?
A. Thirty-six or forty.
Q. How far is it by railroad?
A. I think it is thirty-six, if I am not mistaken; wait a minute; I am wrong on that.
Q. More than that from Claremore to Lenapah.
A. I counted from Lenapah to Nowata.
Q. Something like a hundred miles isn't it? Approximately a hundred miles?
A. It is not that far, I don't think; seventy-five, I think.
Q. Seventy-five miles?
A. Yes.
Q. On what did you base the opinion given to Mr. Waters that he should take 12 thousand dollars for the interest of Eva Waters in this fifty acres of land?
A. On the production surrounding this land.
Q. Are you familiar with this land?
A. I have been on the land.
Q. How many times?
A. Only once; one time.
Q. Are you familiar with the lands surrounding this fifty acres?
A. I am not familiar with them; I saw them once only.
Q. Do you know any—the oil companies or any of the individuals who are producing oil from contiguous lands to this fifty acres?
A. I understand Mr. White is—I don't know.
Q. You don't know of your own knowledge?
A. No, sir.
Q. Matter of fact, you don't know what the production of the lands around this fifty acres is, do you?
A. Except from what I saw of the wells and what other parties have told me.
Q. How long were you there at the time you went on this piece of land?
A. About two hours and a half, I guess, or three hours.
Q. What did you go there for?
A. Well, I went there in behalf of Mr. Waters. He asked me to go there and look at this land, and see what I thought would be a fair price for him to relinquish it.
Q. Can you by looking at an oil well tell what its production is?
A. When I see it flow, I can give a pretty good——
Q. Were these wells flowing?
A. They were pumping, and I think one or two flowing.
Q. What wells did you see about these lands?
A. Wells on the south and on the east.
Q. When did you go there?
A. I don't remember. About the 5th I think it was.
Q. Of what?
A. April.

Q. How many wells did you find south of this land?
A. I don't remember; there were fourteen, I think it was, surrounding this fifty acres.
Q. You testified that you saw the production from the wells on the south and on the east, did you not?
A. Yes sir.
Q. What were the production of the wells on the south?
A. Well, they ran somewhere between fifty and a hundred and fifty, so I was told.
Q. Well, are you testifying from what you were told or
42 from your own personal knowledge?
A. Well, I saw several of these wells flowing, that is, the oil flowing from them, pumping, and they didn't seem to be heavy wells at all; that is what I based my opinion on.
Q. Purely guess-work on your part, as a farmer, making a guess as to the production of the oil well?

Mr. ZEVELY: We object to that; purely argumentative.

Q. Answer the question.
A. Possibly part of it was guess-work.
Q. How many wells did you find on the south?
A. I don't remember now.
Q. And they, in your opinion, were flowing from fifty to one hundred and fifty barrels per well?
A. Those on the south were lighter wells than those on the east.
Q. Lighter wells?
A. Yes, seemed to be.
Q. You never had any control of oil production, did you, ever drilled any land from which you obtained oil?
A. My wife and children had three allotments about three hundred and sixty acres, part of it developed.
Q. You never developed any of it yourself, did you?
A. No sir
Q. Have you been on that land since the first time, Mr. Gates?
A. No sir.
Q. You don't know anything about its value now, then?
A. No sir.
Q. Now, who was it you talked with about the production of this land when you went out there about the 5th of April last?
A. Well, I talked with Mr. White, and to——
Mr. ZEVELY: With Mr. White—P. J. White.
A. Mr. P. J. White, and with the parties who were taking care of the lease out there.
Q. Did you know who those parties were taking care of that lease for?
A. I don't.
Q. Is Mr. White one of the gentlemen who has a lease on a portion of this land, or is contending in this proceeding?
A. I don't know about that.
Q. Who defrayed your expenses from Nowata over here and back when you came to look at this land?
A. I did.

Q. Were you ever reimbursed by anybody?
A. Yes sir.
Q. Who?
A. Mr. White.

T. A. CATES.

W. S. MOWRIS, first being duly sworn, upon his oath deposes and says:

Direct examination.

By Mr. ZEVELY:

Q. State your name and age and residence and occupation, if you please.
A. William S. Mowris; 42 years; Tulsa; oil operator.
Q. Occupation?
A. Oil Operator.
Q. What did you say your occupation is, Mr. Mowris?
A. Engaged in the oil business.
43 Q. How long have you been engaged in the oil business?
A. Since about 1886.
Q. In what states?
A. In Pennsylvania, West Virginia, Kentucky, Ohio, Indiana, Illinois, Texas, Kansas, and Oklahoma.
Q. In what branch of the business have you been engaged?
A. In all its branches.
Q. All its branches?
A. Taking leases, building pipe line, drilling wells, producing oil, pumping wells.
Q. Have you had anything to do with any other feature of the oil business, actual production, drilling, and so on?
A. Taking leases.
Q. You have taken leases, have you?
A. Oh yes.
Q. Are you—how long have you been in Oklahoma?
A. Since the oil business started here.
Q. Do you remember about the date?
A. About 1904.
Q. Are you fairly familiar with the Oklahoma fields?
A. Most of it.
Q. Are you familiar with what is known as the Flat Rock Pool? The North Tulsa field?
A. I have been out in the North Tulsa field.
Q. Mr. Mowris, this is a controversy involving the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4 of Section 19, Township 20 North, Range 13 East, and the East 20 acres of Lot 2 of Section 19, Township 20 North, Range 13 East. The controversy is between Hermon Knight, contestant against Eva Waters, for the thirty acres first described, and between William J. Twist and Eva Waters, a minor, for the 20 acres last described. Have you been upon that land? It is in 19, 20, 13.
A. Yes, I have.

Q. You may use the map here before you if it is of use to you, showing the land. When were you on this land, Mr. Mowris?

A. Why, in August 1908, and in August 1909.

Q. When were you there in August, 1909, on what date?

A. Why, on Monday.

Q. Monday, the 23rd?

A. This week.

Q. Monday the 23rd.

A. Yes.

Q. How did you happen to go out there on Monday, the 23rd; who asked you to go out, if anybody?

A. Why I went out with Mr. P. J. White.

Q. Did you go for the purpose of making an estimate of the value of that property?

A. I went out to look at it, and see if it was the same property that I had in mind a year ago.

Q. You investigated the property, then, on the 23rd of August?

A. Yes sir.

Q. 1909?

A. Yes sir.

Q. From your experience as an oil man and from your observation of this fifty acres, what would you say is the value of it for oil purposes, or for any purpose, what is the value of it, for the fee—fee to that land, free from any incumbrance, lease, mortgage, anything else?

A. At what time?

Q. When you were there on yesterday.

44 Mr. Cook: August 23rd, 1909.

A. Well, I don't think I would want to give for those two tracts, the way they look now, or on the 23rd of August, more than twelve or fourteen thousand dollars for them.

Q. You mean for the fee?

A. For the two tracts.

Q. I mean for the fee; I am talking now about the fee, if you were buying the thing outright, the whole fifty acres?

A. Yes, I would not give that for the lease on it.

Q. What would you give—I don't mean what you would give, but what is your opinion of the market value of the Herman Knight thirty acres?

A. Oh, about a hundred and fifty or two hundred dollars an acre.

Q. What is your opinion of the value of the twenty acres?

A. About the same.

Q. Hundred and fifty or two hundred dollars, I understand you to say?

A. Yes.

Q. What in your opinion would have been a reasonable bonus to have paid for the whole fifty acres in April 1909, for a lease bearing a royalty of twelve and a half per cent?

A. Oh a hundred dollars an acre would have been all I would pay—it would have been a big price to pay, I should think taking into consideration the conditions of the oil business in Oklahoma.

Mr. Zevely: We object to that; purely argumentative.

Cross-examination.

By Mr. COOK:

Q. Mr. Mowris, what companies are you connected with?
A. Vicmar Oil Company, and myself.
Q. Is that all?
A. Yes.
Q. Do you represent any of the pipe lines?
A. No sir.
Q. Not connected in any way with any of them?
A. Not in any way at all.
Q. Mr. Mowris, have you any interest in any oil production contiguous to this fifty acres, about which you are testifying?
A. No, I have no production in that pool.
Q. Are you interested in any companies that are producing in that pool?
A. No, I just have a lease up there, is all.
Q. On what land?
A. Nellie Bullette.
Q. How far is that from this fifty acres?
A. Less than a mile.
Q. What direction?
A. South.
Q. When you were out there on the 29th, did you observe how many wells there were, on the 23rd—how many wells there were immediately around the line of this fifty acres?
A. I noticed it was pretty well drilled around.
Q. Have you any idea what production there is over this lease, immediately surrounding the land?
A. Oh, I have the same idea other people have who hear the talk around.

Mr. ZEVELY: I object to any further questions about that; object to the question as incompetent, irrelevant and immaterial, not tending to prove any issue in this case.

45 Q. What is your opinion as to the production of those wells, if you have any?

Mr. ZEVELY: Same objection.

Q. Answer the question.
A. My opinion is they are average wells.
Q. About how many barrels per day?
A. Somewhere around thirty or thirty-five barrels.
Q. Is that based on personal investigation?
A. No; that is based on my observation from experience through Oklahoma, that these wells, after they get their heads off, get down around thirty or forty barrels pretty soon.
Q. Do you know what the production of those wells were about April last?

Mr. ZEVELY: Same objection, Mr. Stenographer.

Q. Answer the question.

A. I knew what the production was when they were fresh, when they commenced to get them in 1908.
Q. What were they at that time?
A. Oh they would start off from hundred and fifty barrels on up.
Q. Up how far?
A. Oh some of them, five or six hundred barrels.
Q. Any of them producing that much now?
A. No sir, I don't think so.
Q. What time in 1908 was that?
A. Along in the fall of 1908.
Q. You are an experienced oil man, are you not, Mr. Mowris?
A. I am in the oil business; been producing oil.
Q. From your experience as an oil man, are you or are you not of the opinion that wells drilled in this fifty acres——

Mr. Zevely: How is that?

Q. I am asking him his expert opinion—what would be the production of wells drilled in the center of this fifty acres at this time?

Mr. Zevely: Objected to as incompetent, irrelevant, immaterial, and not tending to prove any issue in this case.

A. Whereabouts?
Q. Anywhere in the center of this tract of land.
A. Could get some good wells in the center of it.
Q. Think you could get any of those five or six hundred barrel wells?
A. You might.
Q. You reside in Tulsa, do you, Mr. Mowris?
A. Yes sir.
Q. Have you been here continuously this summer?
A. Yes, I have been here since June.

Redirect examination.

By Mr. Zevely:

Q. You think you would be likely to get a five hundred barrel well anywhere on this fifty acres?
A. You might get a well or you might get a dry hole; I don't know. I haven't been down there.

W. S. MOWRIS.

46 Henry Steinberger, being first duly sworn, upon his oath, deposes and says:

On direct examination.

By Mr. Zevely:

Q. State your name, Mr. Steinberger, and your occupation, and age, and residence.
A. My full name is Henry Steinberger; my residence is Tulsa, and my occupation is the oil business.
Q. Your age?
A. Fifty-seven.

Q. How long have you been in the oil business, Mr. Steinberger?
A. About thirty years.
Q. Where?
A. Well, I have been in the State- of New York, Pennsylvania, West Virginia, part of Ohio, Kansas, and Oklahoma.
Q. How long have you been in the Oklahoma field?
A. Been in the Kansas and Oklahoma field six years. Five years, at least.
Q. How long have you lived at Tulsa?
A. Going on four years.
Q. Are you familiar with what is known as the North Tulsa oil field?
A. Fairly well.
Q. Have you ever heard anything about the controversy pending in the courts and in the Department in which Herman Knight and William J. Twist are contesting the rights of Eva Waters, a minor, to certain lands out there?
A. Yes sir.
Q. The lands in controversy, Mr. Steinberger, are the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W 4 and the East 20 acres of Lot 2, all in section 19, township 20 north, Range 13 East. You ever been on that land?
A. Yes sir.
Q. When were you there?
A. I just came through it, about an hour ago.
Q. You went out there today, did you?
A. My business calls me through there nearly every day.
Q. Has your business called you through there frequently?
A. Yes sir.
Q. For how long?
A. The last five or six years.
Q. Have you been through there repeatedly since the lands immediately surrounding the lands in controversy were drilled up?
A. Yes, I seen all of these wells drilled; that is, I seen them spring up, as I went through there.
Q. Do you know about how many wells are surrounding this fifty acres?
A. I tried to count them the other day; I made them eighteen.
Q. Do you know anything about how much these wells produce?
A. Well, I approximately know.
Q. Well?
A. All got to guess at it, you know.
Q. Well, let's have your judgment about it.
A. The wells on the north side of this thirty acres are whole lots the best wells; these down here are small.
Q. What are those on the north producing?
A. Well, I would guess those wells out at fifty or sixty barrels, now.
Q. What about those on the south?
A. Smaller wells; thirty or thirty-five barrel wells.

47 Q. What about those on the east?
A. They are small wells.
Q. What about those on the west?
A. They were good wells.
Q. What are they doing now?
A. I suppose those eight wells, as near as I can find out from the boys, they are making between three and four hundred barrels.
Q. The eight?
A. Yes sir.
Q. Mr. Steinberger, what is your opinion based upon your experience of thirty years in the oil business, and your knowledge of this surrounding country, having come in contact with it recently, as to the value of the fee to this fifty acres I have described to you, if it were free from incumbrance of lease or any incumbrance?
A. Just now?
Q. Yes sir.
A. I suppose they could get eighteen thousand dollars for that.
Q. About three hundred and fifty dollars an acre?
A. Yes.
Q. I ask that for the——
A. I say probably could get that for it.
Q. I say, about three hundred and fifty an acre?
A. Yes probably get that for it.
Q. Mr. Steinberger, what would be your opinion of what would have been a fair bonus to have paid for a- oil and gas mining lease—two oil and gas mining leases, one on the thirty, and one on the 20, in April of this year, considering that the royalty was twelve and a half per cent?
A. On the whole fifty?
Q. On the whole fifty?
A. Well, twelve thousand dollars would have been an awful big price.
Q. Twelve thousand dollars would have been a big price?
A. Yes sir.

On cross-examination.

By Mr. Cook:

Q. Where do you live, Mr. Steinberger?
A. Tulsa.
Q. Been here all the summer?
A. Yes sir.
Q. Since Spring?
A. Yes sir.

Mr. Zeverly: I have endeavored to see what this is for. I interpose the objection to this question *of* incompetent, immaterial, and not being as to the issues of the case.

Q. You say you see this land frequently?
A. Yes sir.
Q. How come you to see this land so frequently?

A. Well, I have done a little work north of this; drilled probably twenty wells north of this field here, so I naturally have to go through this field to get to my own affairs.

Q. How far are your wells from this field?

A. I have drilled wells as much as four miles north, and I am drilling now six miles north of this field, and one well eight miles north of this field.

Q. Have you any lease immediately surrounding this land?

A. Not immediately surrounding this.

Q. How far is your nearest lease?

A. We are about eight or nine miles north.

48 Q. Are you drilling for yourself or anyone else?

A. I am drilling for myself, and I am drilling mostly by contract.

Q. Are you drilling by contract for any one immediately around this land?

A. No sir, not down here.

Q. Mr. Steinberger, the longer—is it your opinion—is it or is it not your opinion that the longer these sixteen or eighteen wells you counted around these lands continue to operate or to be pumped, that it will depreciate the value of this fifty acres?

A. The evidence now is that these wells are depreciating very fast.

Q. Have you an opinion as to the depth of the producing sand in this field? North Tulsa field?

A. Well, we got three sands up there; this is about twelve hundred foot depth here.

Q. What is the depth of producing sand, after you get to the twelve hundred feet?

A. This here?

Q. Yes.

A. Well, I can't tell you absolutely to the foot. My understanding is the wells finish up a little better than twelve hundred and fifty feet.

Q. You don't catch the drift—the oil sand is at twelve hundred feet?

A. Yes sir.

Q. The depth of the sand?

A. I understand they drill from forty-five to fifty feet in it.

Q. How do you classify these oil sands?

Mr. ZEVELY: Let the objection stand to all of this.

A. Let me understand that question.

Q. You have a sand known as loose, medium, and firm, have you not?

A. Oh yes.

Q. What is the sand in this particular field?

A. It varies; where the wells are the best in the north part of these fields, pay sand was much thicker; when it got near the edge of it, the sand itself may be as thick, but the pay is much thinner.

Q. Is the field of such character that continuous drilling of wells

immediately surrounding it, that it will draw oil from beneath this fifty acres?

A. I surely think so.

Q. The longer they are pumped, the greater the depreciation in the land?

A. Yes sir.

Q. Is there any way in which you could give an estimate as to the depreciation per month in this field, from the number of wells immediately surrounding it being pumped?

Mr. ZEVELY: I want to interpose the further objection there that the question ought to be made more definite and specific, if it is applied to this land in controversy; the same objection that pertains to all these questions.

Mr. COOK: All right; answer the question.

Q. Surrounding this fifty acres?

A. Yes sir; I have in mind a lease north of it, and I don't know just which one it is, that the production of the initial well was reported at a hundred barrels an hour; the chances are it never made twenty-four hundred barrels, but there are five wells there now, and the production is four hundred barrels. I seen that on the
49 books the other day. I wouldn't like to abuse the confidence of these people, but I know that to be right. Among them is this big well.

Q. Mr. Steinberger, if one well on a certain area of land, and afterwards it is drilled, putting in more wells, wouldn't it depreciate the production of the first well considerably?

A. I think every well depreciates the production of the first well; there is so much oil an acre, the same as coal.

Q. Drilling other wells close to this big well, would have depreciated its production?

A. That and the surrounding wells.

Q. Do you know what those wells are producing now?

A. Which, those——

Q. Immediately around this fifty acres.

A. These wells around here?

Q. Yes.

A. All I can get at is, we size them up by the streams. Life would be too short for a disinterested party to gauge those wells, but we think we can get close to it, and there might be better than sixty-five wells on the north side of that; White Brothers may have some better wells, but I don't think it.

HENRY STEINBERGER.

E. R. PERRY, being first duly sworn, upon his oath, deposes and states as follows:

Direct examination.

By Mr. ZEVELY:

Q. You are Mr. Perry?

A. E. R. Perry, Attorney at Law; Tulsa, Oklahoma.

Q. You rather not tell your age?
A. Rather not tell the age.
Q. Mr. Perry, do you represent any of the parties in the case in the Department, known as William J. Twist vs. Eva Water-, a minor, and in the mandamus proceedings now pending in the Supreme Court of the District of Columbia, known as William J. Twist, plaintiff, vs. Richard J. Ballinger, Secretary of the Interior?
A. Yes sir, I am one of counsel for William J. Twist in all these proceedings.
Q. Were you in Washington in May of this year, when the proposition of compromise between Herman Knight and William J. Twist, on one side, and Eva Waters, through her guardian, on the other side, was presented to the Secretary of the Interior?
A. Yes sir, I was.
Q. You participated in the argument of that controversy?
A. Yes sir.
Q. Do you remember the date the Secretary of the Interior rendered his decision, awarding the lands in controversy to Herman Knight and William J. Twist?
A. Yes sir; that was on the 10th day of May last.
Q. Did you subsequently to the rendering of that decision, have any conversation with the Secretary of the Interior upon this subject?
A. Yes sir, two or three different occasions.
Q. When was the first one, if you remember?
A. I cannot give the exact date, but it was a few days, not
50 more than four or five days after the decision of the 10th.
Q. With whom was that conversation?
A. With Assistant Secretary, Franklin Pierce.
Q. And what was the conversation—just in substance?
A. Why, I raised the question of the rapid drainage of the property, and he told me that he had authorized the lessees of William J. Twist and of Herman Knight, respectively, to take possession and proceed to operate the land by development. That he had authorized them to do this on the 10th, at the time he rendered decision awarding the land to them. Subsequently, I had another conversation with him, in the presence of Commissioner J. George Wright; at that time Mr. Pierce again said that he had authorized these lessees to go in and proceed with the development. Then about the 1st of June I believe, I am not sure as to the exact date, but it was sometime before the motion for review had been filed by attorneys for Eva Waters, Mr. H. P. Anderson of Tulsa, was in Washington, and he and I went together to Mr. Pierce's office, and Mr. Pierce again said that he had authorized us at the time that he awarded the land to Twist and Knight, respectively, authorized their lessees to take possession immediately, and proceed with the development of the property, because of the fact that it was being rapidly drained.
Q. You notified your client?
A. Yes sir, I wired immediately after the decision of the 10th, giving the substance of the decision, including the authority granted by the Assistant Secretary Pierce, to go in and develop.

Cross-examination.

By Mr. COOK:

Q. Have you that telegram?
A. No; naturally I wouldn't have it.
Q. Have you a copy of it?
A. No. I just handed in a telegram at the office in Washington.
Q. Who was it sent to?
A. It was sent to H. P. Anderson.
Q. Do you know whether he received it?

Mr. COOK: Just for the purpose of objecting.
Mr. ZEVELY: All right.

Q. Do you know whether he received it?
A. Yes. He wired back the next day, stating the telegram was received, and asking some further information on the subject as to when the deeds would issue.

Mr. COOK: I object to the testimony of the witness as to the telegrams. The telegram is in existence, and is the best evidence.

Direct examination.

By Mr. ZEVELY:

Q. Mr. Perry, were you present at a subsequent—on a subsequent date, in the Department of the Interior at Washington, when Mr. Assistant Secretary Pierce granted what he termed a motion
51 for rehearing or reopening of this case, which had been settled on the 10th of May?
A. On the——

Mr. COOK: Wait a minute. I object to the witness answering the question as propounded by Mr. Zevely, because it presupposes the case had been settled, and there is no evidence introduced showing that it had been settled prior to that date.

A. On the 21st of May I was requested by Mr. Severn to come to the office of *the* Secretary Pierce, at the Interior Department. I did so, and I found there Mr. Severn and Mr. Scofield, of Westville. They had presented a motion for the rehearing or review, rather, of the case, together with a motion to set aside a confession of judgment. Mr. Pierce then announced that he would give them thirty days from the 10th day of May in which to file their motion.
Q. Who is Mr. Severn?
A. Mr. Severn is an attorney in Washington, of the firm of McCoy, Severn & Mark.
Q. Is he the gentleman now with Mr. Cook?
A. Yes sir.
Q. And who is Mr. Scofield?
A. Mr. Schofield, I believe, is an attorney of Westville.
Q. Is he here?
A. Yes sir.
Q. The attorney with Mr. Cook also?

A. Yes sir, he is there.

Q. Did you have any subsequent interview with Mr. Pierce relative to this subject?

A. Yes sir, on the 24th of June, I, together with Mr. J. M. Givens, of the firm of Zevely, Givens & Smith, who was there representing both the Twist and Knight interests, were summoned to go before Secretary Pierce. We did so on that day and Secretary Pierce announced he would set aside the confession of judgment, and set both cases for trial on their merits.

Q. Did he assign any reason for his action?

A. Mr. Pierce talked but very little when he gave that decision. He said that he had arrived at the conclusion that he ought to set aside his former ruling awarding the land to Twist and Knight respectively. The only reason that he alleged was that at the time he made the original decision on the 10th of May, he had not had sufficient evidence as to the value of the land in controversy.

Cross-examination.

By Mr. COOK:

Q. Did Mr. Pierce make a decision to that effect?

Mr. COOK: Just for the purpose of objection.

A. Mr. Pierce made that statement. Wouldn't call it a decision, exactly.

Q. You don't know whether he rendered that decision?

A. Decision to what effect?

Mr. ZEVELY: Let him make his objection.

Mr. COOK: Go ahead, then.

Mr. ZEVELY:

Q. Mr. Perry did Mr. Assistant Secretary Pierce, on the 52 24th of June, in making his statement, decision, or whatever you term it, say that he had been misled at any time, by anybody for a reason for setting aside his former decision?

A. There was absolutely nothing of that kind said by Mr. Pierce at any time.

Cross-examination.

By Mr. COOK:

Q. Mr. Perry, as a matter of fact, was not the conversation you refer to as having taken place before Mr. Pierce on the 21st day of May, when Mr. Scofield and Mr. Severn were there, that Mr. Severn and Mr. Scofield requested Mr. Pierce to permit them to examine the record in this contest proceeding for the purpose of having a motion to review his decision?

A. Well, that is really in my judgment rather a quibble. It was Mr. Pierce's talk—it was to the effect that Mr. Severn and Mr. Scofield would be given until the 9th day of May, 9th day of June,

which would be thirty days from the decision on the 10th of May, in which to examine the record and file their motion for a review of his decision.

Q. Of his decision?

A. Of his decision of May 10th.

Q. What was that decision of May 10th?

A. That decision awarded the land in controversy to Twist and Knight respectively, without any frills.

Q. Was that made in the nature of compromise in the proceedings affecting this land at that time?

A. That was made in the way of acceptance of the confession of judgment filed by the guardian of Eva Waters.

Q. Wasn't an offer of twenty-five thousand dollars made as a compromise to clear up the proceedings pending effecting a contest on this land?

A. The whole compromise naturally would have the effect of staying all proceedings in the cases on their merits; from the time the guardian first confessed judgment, until the confession of judgment by him was approved by the Secretary.

Q. These conversations you related here as having taken place with Secretary Pierce, at the time this compromise was being spoken of——

A. Now, I don't understand; I have spoken of conversations I had with Secretary Pierce all the way from——

Q. Relative to the time you alleged you were instructed authorized your people to proceed with drilling, for the reason that the land was being rapidly drained?

A. Put that question directly.

Q. Read the question (question read).

A. Well, that is a qualification; what is the question?

Q. Were those conversations—did those conversations take place at the time you discussed this compromise by your people paying twenty-five thousand dollars for this lease?

A. No; all the conversations that I have narrated took place after the Secretary had approved the confession of judgment, and had authorized us to go into the possession; he authorized us at the time he approved the confession of judgment on the 10th day of May. The conversations I have narrated all took place after that.

Q. What date did this conversation relative to your being instructed as to the drilling take place?

53 A. As I said before, the first one after the decision was handed down awarding the land to Twist and Knight, three, four or five days after that. About the 14th or 15th. Then at a time subsequent, with J. George Wright present.

Q. What date was that?

A. I am sure I cannot state the exact date, but approximately the 25th or 26th of May; then subsequently with Mr. H. P. Anderson, which—this is only an approximation of the date—I have a very clear recollection of the incident, but the exact date, I think was about the 4th or 5th of June.

Q. What was the conversation had with Mr. Pierce at the time Mr. Wright was present?

A. I asked Mr. Pierce the question whether, on account of the new complications having come up and the time having been granted Mr. Severn and Mr. Scofield in which to file their motion for review, whether the authorization he had previously give to go ahead with work on the lease, still held good, and he said that it did. Now, the conversation had when Mr. Anderson was present, Mr. Anderson carried on that conversation with Mr. Pierce. He asked Mr. Pierce if he, Mr. Pierce, had authorized us to go ahead; take possession and go ahead with the work, and Mr. Pierce said that he had.

Q. Now, what did Mr. Pierce say that led you to believe—was an authorization for you to proceed with the drilling of this land?

A. Mr. Pierce said that we were to take possession and proceed with the development of the property; that was my understanding, without any qualifications, was what Mr. Pierce said.

Q. That was in the presence of J. George Wright?

A. In the presence of J. George Wright, and also in the presence of Mr. Anderson, later on.

Q. Mr. Wright present at the second conversation with Mr. Anderson?

A. No sir.

Q. That took place in June?

A. The second conversation at which Mr. Anderson was present, took place, as I remember, the 4th or 5th of June. The whole tenor of the conversation was to the effect that we were to protect the land by drilling on account of its being drained.

Q. What date did you say this conversation, in the presence of Mr. Wright, took place?

A. It was after the 21st of May, and I think it was along about the 24th or 25th.

Q. Are you sure it was after the 21st?

A. Yes, I am sure it was after the 21st.

Q. Can you repeat the exact words of Mr. Pierce, authorizing you to proceed with drilling on this land?

A. No, I cannot repeat the exact words; can repeat the substance, as I have a dozen times.

Q. How long have you been practicing law, Mr. Perry?

A. At Tulsa, three years.

Q. Have you ever had any practice before the Five Civilized Tribes?

A. Yes sir.

Q. Did you ever have any contest cases?

A. Yes sir.

Q. Are you familiar with the contest rules?

A. Not as familiar as a man ought to be.

Q. You have read them, haven't you?

A. Haven't read them all.

54 Q. You had some cases there?

A. Yes, this one, for instance, and one or two others; not very many contests before the commissioner.

Q. When were you admitted to practice before the Department and the Commissioner?

A. I was admitted to practice to law four years and a half ago, at Nowata.

Q. Before the Department, I am referring to, Mr. Perry, the Commissioner to the Five Civilized Tribes.

A. Why, I never went through any preliminary examination or motion, anything of that kind, to get the right to practice before the Commission or Agency, or Department.

Q. You have appeared, then, and participated in contests, have you not?

A. Yes sir.

Q. And you have filed papers in contest proceedings there?

A. Yes sir.

Q. You say you don't remember what the words of Mr. Pierce were at the conversation with Mr. Wright, when he authorized you to drill on this land?

A. No; I naturally cannot remember the exact words at this distance.

Q. Remember anything near what he said—any of his words?

A. The question was as to whether the lessees of Twist—who was the only one that I was personally interested in—were authorized to go ahead with the development of the property. Just how many words he used or what they were, I cannot say, but the whole tenor of the answer was that we were authorized to go in and get to work.

Mr. ZEVELY: That applied to the thirty acres as well as to the twenty?

A. Yes sir; applied to the whole fifty.

Q. Now, when you were present at the time when Mr. Severn and Mr. Scofield came in relative to filing a motion in this proceeding, to review the former decision of the Acting Secretary, did you hear him tell them they had until the 9th of June, in which to perfect that motion?

A. Yes sir; I registered an objection to it.

Q. What was your objection?

A. That the time was too long; if he was going to attempt to do anything whatever, that the time was too long.

Q. That was the only objection in your opinion, that the time was too long?

A. I objected to the whole proceeding and particularly to the time—length of time given. Mr. Scofield said at the time he thought he could get through in about a week; well this was the 21st, and they practically asked for only a week, and they were given over two weeks. We objected, of course, to the whole proceeding.

Q. The decision had been rendered May 10th?

A. May 10th, yes sir.

Q. Have you been here all the summer?

A. Yes sir, except two months I was in Washington.

Q. When did you come back?

A. Came back about the 1st of July.

55 Redirect examination.

By Mr. ZEVELY:

Q. At the time Mr. Assistant Secretary Pierce, on the 6th day of May, at the conclusion of the oral arguments, said that the offer made by Knight and Twist were not sufficient, do you remember why he said he would not approve that compromise at twelve thousand dollars?

Mr. COOK: I object to that question because it is not shown that he knew why the Secretary said that.

Q. I asked him if he heard the Secretary say.

A. The Secretary said he knew personally about the value of this land, and in his judgment it was not enough; said he had seen the land himself.

Recross-examination.

By Mr. COOK:

Q. Did that conversation take place at the time you were trying to effect a compromise as to this land?

A. Yes, before the compromise was finally approved by the Secretary.

Mr. COOK: I ask that that be stricken out, the conversation affecting the compromise, as not subject to examination in this testimony.

E. R. PERRY.

AUGUST 25, 1909—10 o'clock a. m.

W. A. MARTIN, first being duly sworn, upon his oath, deposes and says:

On direct examination.

By Mr. ZEVELY:

Q. State your name and age and residence and occupation, please Mr. Martin.

A. W. A. Martin; Bartlesville, Oklahoma.

Q. What is your occupation?

A. Superintendent of oil wells.

Q. What is your age?

A. Thirty-three.

Q. How long have you been engaged in the oil business, Mr. Martin?

A. About fifteen years.

Q. In what capacities have you been engaged in the oil business?

A. Well, in all lines, I guess.

Q. All lines of it?

A. Yes sir.

Q. What are you doing in the oil business now?

A. Superintending oil wells.

Q. For whom?

A. Well, for Mr. H. F. St. Clair, the Alpine Oil Company; Howe Oil Company; Fulton Oil Company, and the Portland Oil Company.

Q. Are you familiar with the fifty acres of land in the North Tulsa Oil fields, known as the Knight-Twist piece of land 30 acres claimed by Herman Knight and 20 acres by Twist?

A. Yes sir.

Q. You know about that land, do you?

A. Yes sir.

Mr. ZEVELY: Put in the description, if you please.

56 N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4 and the East 20 acres of Lot 2, all in Section 19, Township 20 North, Range 13 East.

Q. Are you employed in the vicinity of this fifty acres of land now?

A. Yes sir.

Q. Where?

A. On the Alpine Oil Company's.

Q. On what land, if you can tell from this plat?

A. Well, it is on the Kelley and Connor fifty-acre farm.

Q. What is the position of that Kelley and Connor fifty with reference to the Herman Knight thirty acres?

A. Well, it lays to the north of the Herman Knight.

Q. Adjoins it on the north?

A. Yes sir; also have this Albert T. Lloyd, adjoining it on the south and east, and the Margaret Lloyd on the east.

Q. How long have you been employed out there, Mr. Martin, on these two tracts of land that you speak of?

A. Since last September.

Q. Have you been in charge of the drilling on those two tracts of land?

A. Yes sir.

Q. What company owns the lease—what company is drilling on the Kelley and Connor tract?

A. The Alpine Oil Company.

Q. What company is drilling on the Carrie Keys tract?

A. The Little Rock Oil Company.

Q. Have you superintended the operations on the Kelley & Connor tract from the beginning?

A. Yes sir.

Q. How many wells are drilled there?

A. Thirty-two wells.

Q. On the Kelley-Connor tract?

A. On the Alpine Oil tract.

Q. How many on the Kelley-Connor?

A. Nineteen.

Q. You superintend the drilling of all these wells, Mr. Martin?

A. Yes sir.

Q. When was the first well drilled there, approximately?

A. August or July—July or August; August, I think.

Q. What year?

A. 1908.

Q. Last year?
A. Yes sir.
Q. What was the initial capacity of the wells on the Kelley-Connor tract?
A. Do you mean now?
Q. No, the beginning, at the beginning, when you brought them in?
A. Well, anywhere from three to five hundred barrels.
Q. From three to five hundred barrels?
A. At that time.
Q. Was that so of all of the nineteen wells on that fifty?
A. No sir; well, practically so.
Q. Wasn't any over five hundred?
A. No averege over five hundred; not in the course of twenty-four hours.
Q. How long would they keep up at that production?
A. Well, probably two weeks or thirty days.
Q. How long since you drilled the last well on that piece?
A. The 19th of this month.
Q. What are the wells that were brought in during August, September, and October last year, doing now?
A. Well, in the neighborhood of fifty barrels apiece.
Q. How many have you drilled recently?
A. Four wells.
57 Q. And when were they brought in?
A. This month; the 7th, 9th, and 19th.
Q. Where were these wells with reference to this Herman Knight tract of land?
A. Right on the north line.
Q. How much did those wells do when you brought them in?
A. The four of them were doing about three hundred barrels.
Q. Altogether?
A. Yes sir.
Q. What did they come in at—any head on?
A. About seventy-five barrels apiece.
Q. They are still doing that?
A. Yes, they are just lately in.
Q. Shot them yet?
A. Yes sir.
Q. On the pump, are they?
A. Yes sir, two of them are flowing and two on a pump.
Q. Now, when did you drill the wells on the Albert Lloyd ten acres, which lies—which is the southeast corner of the forty in which the Herman Knight thirty acres are situated?
A. Well, sir, one of those wells was drilled in December, and the other one in——
Q. December, 1908?
A. Yes sir.
Q. And the other one?
A. The other one was drilled in the latter part of March or the first of April; I don't remember the date.

Q. This year?
A. Yes sir.
Q. What are those wells doing?
A. About fifty barrels apiece.
Q. What did they do when brought in?
A. Well, one of them came in about three hundred barrels and the other a hundred barrels.
Q. And they are now doing, you say, fifty barrels apiece?
A. About fifty barrels apiece.
Q. Now, are those all of the wells, Mr. Martin, that you have superintended the drilling of there, immediately in the neighborhood of this land described? You have not drilled any other wells around this tract, have you?
A. No sir, I have not, except on the south here and north and east.
Q. Which is those we have talked about?
A. Yes sir.
Q. Now, are you familiar with the other wells that have been drilled in the land—on the land surrounding the Wm. J. Twist 20 acres and the Herman Knight 30 acres?
A. Well, I don't just gauge them, but I know in the neighborhood of what they are doing.
Q. You are about there all the time?
A. Yes sir.
Q. And from your experience and observation, you can tell?
A. Yes sir.
Q. That is of your own knowledge?
A. Yes sir.
Q. How many wells are on the west of the William J. Twist 20 acres; look at this map here.
A. I am not positive, but I think there is four wells on that line, and three up on this one; I think there is four wells.
Q. Know how long those wells have been in?
A. Well, sir, they was drilled in last winter sometime; I think about January or February.
58 Q. By whom, if you know? Who owns the leases?
A. Mr. McFarland.

Mr. COOK: What land is that?
Mr. ZEVELY: The land immediately on the west of the William J. Twist.

Q. Those allotments, parts of the allotments of Rufe Brady and Henry Brady. What did those wells do when they were brought in, if you know?
A. Well, in the neighborhood of two to three hundred barrels apiece.
Q. What are they doing now?
A. Well, I should estimate it at fifty barrels apiece.
Q. Now, Mr. Martin, on the south here and coming over to the William J. Twist allotment, containing 35.41 acres, that is south of the William J. Twist 20, here in controversy; know anything about these wells on the southeast?

A. Well, not very much; they all was fair; I never paid much attention to them.

Q. You cannot testify as to that?

A. Well, here is a well doing about twenty barrels.

Q. That is a well on the Eliza Lloyd 80 acres?

A. Just across the line.

Q. From the Herman Knight?

A. About a 20 barrel well.

Q. Are there any dry—been any dry holes drilled in this vicinity?

A. Yes sir; there is a dry hole drilled down here in the Nancy Lloyd—I believe right in this corner; that would be in the northwest corner.

Q. That is on the south—immediately southeast of the Albert Lloyd 10 acres; about how far is it from the Albert Lloyd 10 acres?

A. Well, it is 200 feet each way; 284 feet from the southeast corner.

Q. From the northwest to the southeast. Mr. Martin, what about the other wells that have been drilled on the north here, in the Payne tract, for instance?

A. Well, those wells came in two to three hundred barrels apiece.

Q. How long have they been in?

A. They were drilled last winter.

Q. What are they doing now?

A. In the neighborhood of fifty barrels.

Q. About fifty barrels. Now, Mr. Martin, you say that you are superintendent for the Alpine Oil Company. How many wells has the Alpine Oil Company in the immediate vicinity of this land in controversy?

A. Thirty-two wells.

Q. Do you ever gauge those wells?

A. Every day.

Q. How much did these thirty-two wells produce yesterday?

A. Fifteen hundred barrels.

Q. Were the wells all producing yesterday, all the 32?

A. Well, nearly so; all but about five of them.

Q. Four or five of them were off yesterday. Now, you say there were five off. In your operation of thirty-two wells, is there ever a day when they are all on?

A. I don't think so; not in that many wells.

Q. You stated what the production was yesterday; what
59 has it been, approximately, a day for the last two months, on these thirty-two wells?

A. Well, in the neighborhood of 1500 barrels.

Q. Kept about the same?

A. Yes sir.

Q. Do you know what it was in April 1909? The latter part of March and the first of April?

A. About, probably twenty-one hundred barrels.

Q. Probably twenty-one hundred barrels.

On cross-examination.

By Mr. Cook:

Q. You say you live at Bartlesville?
A. Yes sir.
Q. Been in the oil business for fifteen years?
A. Yes sir?
Q. Where?
A. Well, at Sistersville, West Virginia, and this western field.
Q. Stay at Bartlesville most of the time now?
A. Now, sir; I stay here most of the time.
Q. Are you here continuously?
A. Well, not every day in the week.
Q. How many days in the week do you spend here?
A. Usually about five.
Q. Is all of your time, when you are here, spent out there on that property you testified about?
A. Yes sir.
Q. Will you tell me whose allotment this Kelly-Connor farm, you spoke of, is on?
A. Whose allotment it is on?
Q. Yes; if you know; who is the Indian to whom that land was allotted?
A. Jennie Archilla.
Q. Is the Kelley and Connor, Fred Kelley and Lon Connor, of Vitnia?
A. Well, I don't know the gentlemen; I met Mr. Connor, but I don't know where he is from.
Q. Who are you operating that land for?
A. The Alpine Oil Company.
Q. They have a sub-lease on it?
A. They have a lease on it.
Q. You say there are 19 wells on that piece of land?
A. On the fifty acres, yes sir.
Q. What is the location of those wells, relative to the fifty acres in controversy in this matter?
A. Which, those nineteen wells?
Q. Yes sir.
A. Well, they lay to the north of that fifty acres.
Q. How far to the north?
A. Well, there is four of them not very far from the line, about fifteen feet, I should judge. From eleven to fifteen feet.
Q. Where are the other fifteen?
A. Well, they are located—they are drilled around the line, about a hundred feet from the line, on the fifty acres, as near as I could designate it.
Q. Do you go clear around the line?
A. Yes sir.
Q. Have you got any wells on this Kelley-Connor farm off-setting the four wells immediately north of the Eva Waters land?
A. Off-setting the four wells?

Q. Off-setting the four wells that you have drilled north of the Eva Waters land?

A. Have we got four wells off-setting four that were drilled on that line?

60 Q. Yes sir.

A. Well, they don't exactly off-set them; drilled kinder between them.

Q. How far away from them?

A. The other wells are two hundred feet, and these were drilled right on the line.

Q. How many wells come two hundred feet from these four wells drilled right on the line?

A. Three wells.

Q. Where are your other 12 wells?

A. Where are which?

Q. The other 12 wells of the 19 on this land?

A. Well, they are drilled right along the line on that 50 acres.

Q. And you have seven wells within two hundred feet of the north line of this land in question here, have you?

A. Yes sir.

Q. What are the production of those 7 wells, if you know?

A. Well, about 450 barrels, them seven wells would do.

Q. For the seven?

A. Yes sir.

Q. Are those wells immediately north of the line, producing the oil—immediately north of the Eva Waters land, producing more than the other wells on the Jennie Archilla allotment?

A. Well, those four wells produce a little more because they are drilled just lately, the head ain't off them yet.

Q. When were those four wells drilled?

A. Drilled on the 5th, 7th, 8th, and 19th.

Q. Of this month?

A. Yes sir, of this month.

Q. Then, if Oil Inspector Hamilton made a diagram of this map April 17th, 1909, showing that there were four wells on this land immediately north of the line at that time, was he mistaken.

Mr. ZEVELY: Object to the form of the question. It ought to be more specific and set up the distance which Inspector Hamilton's report shows four wells to be from the line, to enable the witness to answer it intelligently. You can see by an investigation of this plat, there were four wells on that land two hundred feet——

Mr. COOK: That plat has never been sufficiently identified to be considered. Never been identified, to show the time it was made. Your witness was absolutely silent at the time of the making of that map.

Mr. ZEVELY: I will show that by Mr. White.

Q. Then you can tell me—I will withdraw that question, as Mr. Zevely seems to think it is unfair. Can you tell me how near the four—were there any wells within two hundred feet of the north line of the Eva Waters property in April last?

A. Were there any wells within two hundred feet?
Q. On your Kelley-Connor farm?
A. Yes sir.
Q. How far were those wells from the line?
A. Two hundred feet.
Q. Now these wells you have drilled in this month, are between those wells and the line, are they?
A Yes sir.
Q. And they are right on the line?
A. Yes sir.
Q. And what are their production?
A. Well, the four wells are doing about three hundred barrels.
61 Q. What was their original production?
A. Well, that is just about what they came in at; they have lately come in.
Q. Are they all flowing wells?
A. Two of them isn't.
Q. Are you pumping them?
A. Yes sir.
Q. How long have you been pumping them?
A. Well a little over a week.
Q. Are you pumping them to their full capacity, Mr. Martin?
A. Well, as near as we can; I think so.
Q. How many hours a day do you pump these wells?
A. About twenty-four hours.
Q. Do you pump all of them on your farm 24 hours?
A. Yes sir.
Q. Did you pump all of them yesterday 24 hours?
A. Yes sir.
Q. Then you were mistaken when you said five of those wells were not operating then?
A. There is five wells not operating, but not them.
Q. On this farm isn't it?
A. Yes sir.
Q. What five wells are not pumping?
A. Five, not all on the Archilla farm; in the 32.
Q. The 32 wells referred to are not on the Archilla farm?
A. Not all of them; 19 on that farm.
Q. How many of these 19 wells were not being pumped yesterday?
A. About three of them.
Q. Where are those three wells located?
A. Well, I would have to show you on the map.
Q. All right, sir.
A. Right here is one well, and here is another one.
Mr. Cook: Witness indicating to the north.
A. 460 feet from the north.
Q. 460 feet from the north line of the Jennie Archilla allotment?
A. Yes sir.

Q. And how far is this one on the east here?
A. That would be about six hundred feet.
Q. Six hundred feet from the——
A. From the south boundary—460 feet from the south.
Q. How far? Where is that other third well, now, on that allotment not being pumped yesterday?
A. That was this one right here.
Q. How far is that from the north line of the Jennie Archilla allotment?
A. Two hundred feet.
Q. What is approximately the distance from those three wells to the land in controversy now?
A. That would be 860 feet; and this one would be 460, and that one would be 1160.
Q. Now, you have got 12 wells in between these three wells not being pumped yesterday, and the land in controversy, now according to that map, have you?
A. 12 wells that was pumped yesterday.
Q. Yes, according to that plat there?
A. I don't just understand your question.
Q. I say there are 12 wells that were being operated yesterday on this Kelley-Connor farm, which lie between the land in con-
62 troversy here, known as the Eva Waters allotment, and the three wells not operated yesterday, lying from eight to eleven hundred feet from the land.
A. You mean these other 12 wells we had pumping?
Q. Yes; lying in between Eva Waters' land and the wells that were not pumped yesterday.
A. Yes sir.
Q. How long have those three wells been idle?
A. Well, I don't just remember the date.
Q. Well, about how long?
A. Well, probably thirty days.
Q. What is the reason, if you know, why these wells were not pumped?
A. Well, some of them were flowing; we have not put them to pumping yet, and they quit flowing.
Q. They have been flowing wells?
A. Yes sir.
Q. How many of these 12 wells immediately north of this line of this land, and three of them a little to the northeast of the Eva Waters property, were flowing wells?
A. How many of these were flowing wells?
Q. Yes, right along the line?
A. You mean these three wells?
Q. How many of those wells were flowing wells—thirteen?
A. How many are flowing?
Q. Yes sir.
A. There are three of these wells flowing.
Q. What is the capacity of those three flowing?
A. Well, it is pretty hard to tell exactly; them four wells there

are doing about three hundred barrels, and them others are about 50 barrels apiece. Average that on the Kelley-Connor farm.

Q. Would those wells produce more oil if they were pumped, after they quit flowing, than they are producing now flowing?

A. I don't think so; my experience has not taught me that.

Q. Flowing wells produce more than wells pumped?

A. I think they do, because they produce every day, and pumping wells are off now and then.

Q. What is the usual distance between wells drilled?

A. Usually drill about 260 feet apart.

Q. You have come in within two hundred feet from this north line and put three additional wells, have you?

A. How is that?

Q. You have come in within two hundred feet of the Eva Waters allotment, and put three additional wells, haven't you, this month?

A. Four additional wells.

Q. Do you know what the capacity of those four wells you say lie two hundred feet north of the Eva Waters land were in April of this year?

A. Which?

Q. Those four wells that are two hundred feet north of this Eva Waters land, what was their production in April, about the middle of April last?

A. Well, I should estimate them in the neighborhood of 75 barrels apiece at that time.

Q. Then if the Oil Inspector, Hamilton, gauged these wells the 17th day of April, 1909, at 200 barrels apiece, was he mistaken? Answer the question.

A. How is that?

Q. Repeat the question, please.

(Question read.)

A. I don't know the man.

Q. Well, you can answer that question, as to whether or not if he reported that those wells had gauged them and they were
63 producing two hundred barrels the 17th day of April, 1909, was that a mistake on his part, you think?

A. Which four wells did he gauge?

Q. These which you say are two hundred feet north of the line, and he says they are 150 feet north of the line; those four.

Mr. ZEVELY: Answer the question, Martin; tell them about what those wells are doing.

Q. That question is very plain, Mr. Martin. You can answer it yes or no.

A. Well, I estimated the wells at that time as near as I could.

Q. Did you make that estimate from now or from actual knowledge of those wells at that time?

A. Well, from now.

Q. As a matter of fact then you don't know certain what they produced in April, do you?

A. Well, not exactly, but they produced in the neighborhood of that amount; 75 barrels apiece at that time.

Q. How often do you gauge these wells?

A. Well, the wells are gauged every day in the week.

Q. How long have you been gauging the wells?

A. Ever since the property started.

Q. Every day since the property started, you have been gauging them?

A. Yes sir.

Q. Mr. Martin, when were those four wells that we are speaking of drilled in on this land?

A. Which four do you mean along the line of north here?

Q. Two hundred feet north; the first wells that were put in there?

A. Well, the first one was drilled last July or August; and the rest of them were drilled since they was completed tho, along in the winter.

Q. Just approximately.

Mr. ZEVELY: I can refresh his memory and give the exact dates, if you want them.

Mr. COOK: Yes, then give the dates.

A. No. 1 in the southwest corner, drilled August 8th, 1908; that is two hundred feet from the line. And the one east of that—next east of that, was drilled February 21, 1909; and the one next east of that was drilled November 21, 1908.

Q. Now, about the other one east of that?

A. February 20th, 1909.

Q. Dhilled No. 2 and No. 4 about the same time, just a day between the time you brought them in, the second well from the west side and the fourth from the west side, drilled in February 21st and 20th, were they?

A. Yes sir, them wells were drilled very close together.

Q. Have you got any record in your possession showing the daily output of these wells from the time they were brought in up to the present time?

A. Not in my possession I have not.

Q. Do you know what those wells originally brought in, can you designate their—at the time of their drilling, what their initial production was per well?

A. Well, not hardly.

64 Q. Well, about what did they bring in? What did they come in at?

—. ——.

Q. Commencing from your map, there in the southwest corner.

A. Outside of those four wells?

Q. No, those four wells we have been talking about.

A. Those wells would come in from three to five hundred barrels apiece; what they come in at for a few days.

Q. The first few days after they were brought in?

A. Yes sir.

Q. What are those doing now?

A. Well, I say, them wells averaging about 50 barrels apiece.

Q. And those same wells, according to your testimony, were averaging 75 barrels in April last?

A. Well, in the neighborhood of that.

Q. Has your figures and estimate as to the production of these wells—are they as accurate as to the other as they are to these?

A. How is that?

Q. Are your figures relating to the production of these 19 wells on the Jennie Archilla allotment equally as accurate as to the production of these four wells, you are speaking of?

A. Well, hardly; I watched them four pretty close.

Q. Watched them four closer. Taking those four wells we are speaking of, when you gauged them yesterday, what was the production of each well? Commencing at the well on the southwest there, and going across.

A. Well, in the neighborhood of three hundred barrels.

Q. Each?

A. No, the four of them.

Q. The four of them. You don't remember, do you, the production of each.

A. No sir.

Q. How many wells did you state you had down in the Albert L. Lloyd land, lying immediately southeast of this Eva Waters property?

A. We have two wells there.

Q. What is the production of those two wells?

A. They are doing about two—the two wells are doing about a hundred barrels.

Q. When were they brought in?

A. One of those wells was drilled in in December, 1908, and the other one in March or April. I don't just remember the date.

Q. And what was their original production?

A. Well, the first one drilled was in the neighborhood of three or four hundred barrels somewhere, and the second was about a hundred barrel well, when they come in.

Q. Now, what other lands are you controlling in the neighborhood of this land, Mr. Martin, if any?

A. You mean at the present?

Q. Yes sir.

A. None at the present.

Q. Just those two tracts; that of the Alpine. You got the Carrie M. Keys and Little Rock, haven't you?

A. No sir.

Q. You don't work for the Little Rock?

A. No sir.

Q. Just those two?

A. No, we have the Maggie Lloyd there; I understood you in the question to ask me what we are drilling in; these wells are drilled; operating.

Q. What wells you are operating on?

A. That is different. Got the Maggie Lloyd.

65 Q. Where is that located from the Albert Lloyd, right east?

A. Here is the Margaret Lloyd.
Q. Where is the Albert Lloyd, on your map?
A. Right here, and we have the Rosa Lloyd.
Q. Go ahead.
A. Have the Rosa Lloyd and the Laura Lloyd.
Q. These lands lie——
A. East of the Archilla land. This is the Rachael Lloyd; this is the Little Rock.
Q. Now, your experience and long connection with the oil business, Mr. Martin, from these wells you are operating in the vicinity of this Eva Waters land, now, what per cent oil do you think is drawn from under the Eva Waters allotment?
A. Well, I can't say as to that.
Q. Can you estimate?
A. Well, it would be a hard thing for me to do.
Q. What is your opinion as to the condition of this pool there; is it one pool? In this North Tulsa field?
A. Yes, I should think it was one pool.
Q. Then if this is the case, then from every well that is drilled into that pool, will draw oil from off the—under the under surface, will it not?
A. Well, I can't say as to that; I don't know anything about it down under the ground that far.
Q. Well, from your experience, operating oil wells, do you or do you not believe that the seven wells you have got immediately north of this Jennie Archilla land—north of the Eva Waters land, is drawing oil from under that land?
A Well, I don't know that it is.
Q. Well, is it your opinion as an oil man, whether or not it is?
A. It might be drawing some.
Q. Well, what per cent.?
A. Oh I can't estimate that at all; can't have any idea.
Q. But you have been in the oil business twenty-three years?
A. Not twenty-three years.
Q. Fifteen years. Did I understand you to testify that in April the production from these wells on the Jennie Archilla land amounted to twenty-one hundred barrels?
A. In the Jennie Archilla land.
Q. Was it the thirty-two wells?
A. The entire thirty-two wells, yes sir.
Q. What is the relative production, Mr. Martin, of the wells in the south part of the Jennie Archilla allotment and those in the north?
A. Well, they average pretty near the same.
Q. Over the entire allotment?
A. Yes sir.
Q. Which, in your opinion, are the best?
A. Well, them wells average about the same.
Q. Practically no difference then?
A. Very little.
Q. Do you know anything about the production of the four wells

on the Brady allotment, immediately west of this Eva Waters land, both Henry T. and Ruff T.?

Mr. ZEVELY: Call it the Island Oil Company.

Q. The Island Oil Company?

A. I should estimate them wells in the neighborhood of fifty barrels.

66 Q. How long have them been flowing about fifty barrels?

A. They are pumping.

Q. How long have they produced fifty barrels, if you know?

A. I can't say.

Q. Remember anything about them about April as to their production?

A. Well, I don't remember back that far.

Q. Have you an opinion as to where the heart of the production in this field would likely be found?

A. No, I can't say as to that.

Q. Is this Eva Waters land about the middle of that field?

A. Well, it looks to me like it is a little to the south. That is just my idea of it.

Q. Where was that dry hole, you testified about, awhile ago—on what land?

A. That is on the —— Lloyd.

Q. How far away is that from the land in question, Eva Waters land?

A. Well, from the southeast corner it would be about 860 feet, in the neighborhood of that.

Q. Is that the only dry well that has ever been brought out in that field?

A. That is the only one I know of, right in there close.

Q. All the other wells drilled around this land have been producers, have they?

A. Yes sir.

Q. And are still producing?

A. Yes sir.

Q. Are you connected, directly or indirectly with either the Island Oil Company, Los Angeles-Cherokee Oil Company, Little Rock Oil Company, or the Justin Oil Company?

A. I am not connected either directly or indirectly with the first three you spoke of; the last one I am looking after their property.

Q. The Justin Oil Company?

A. Yes sir.

Q. Working for them?

A. Yes sir.

Q. What lands have they under lease immediately around this land?

A. Well, they have the Margaret Lloyd and the Albert Lloyd; I guess that is all.

Q. Who has the lease on this Carrie M. Keys 10 acres?

A. The Little Rock.

Q. You have no connections with them?

A. No sir, none whatever.

Q. Mr. Martin, from your familiarity with this North Tulsa field, and your knowledge as to the production of the various wells, what in your opinion is the best part of that field?

A. Well, I should think the Kelley and Connor was as good as any of it.

Q. That is the Jennie Archilla land. Do you know anything about this Floyd B. Payne land, the forty immediately west of the Jennie Archilla?

A. Not a great deal; I have been over the property.

Q. Is that equally as good as the Jennie Archilla?

A. Well, nearly so, I should judge.

Q. How long did you say you have been operating in this field?

A. September; last September.

Q. September, 1908?

A. Yes sir.

Q. You were not operating out there, then, when the first wells were drilled in on the Jennie Archilla property, were you?

A. Why, I came down shortly after that well was drilled in.

67 Q. Who had charge of it the month before you came there?

A. Fellow by the name of Frank Schaffer.

Q. Then your testimony as to the original production of these wells is not from personal knowledge, is it?

A. Well, it would be with the exception of the one well, and I have seen his grade reports on that.

Q. How many wells have you personally brought in on the Jennie Archilla land, or superintended bringing in?

A. Well, all of them except the first two.

Q. What is the capacity of the largest well that has been brought in by you out there?

Mr. ZEVELY: Make it a little more specific.

Q. At the time of bringing it in, the initial production?

A. Well, five hundred barrels.

Q. And what has been the smallest?

Mr. ZEVELY: If you pardon me, I think the witness is not accurate about that; I would like to refresh his memory.

Mr. COOK: Well, he is testifying practically from his memory as to the other facts.

A. Well, it was in the neighborhood of that.

Q. In the neighborhood of that?

A. Yes sir.

Q. Five hundred.

Redirect examination.

By Mr. ZEVELY:

Q. Mr. Martin, you say you gauged these wells every day; do you mean by that that you gauge each well separately every day?

A. No sir.

Q. How do you make that gauge?
A. We just average them up.
Q. Now, what becomes of the oil produced by these wells daily?
A. With which?
Q. What becomes of the oil of each day——
A. Goes to the tank.
Q. Does it all go to the same tank?
A. No, not all of it.
Q. Several wells go to—how many sets of tanks have you on the Jennie Archilla?
A. We have three.
Q. Three sets?
A. Yes sir.
Q. All the oil from all the wells on the Jennie Archilla go into those three tanks?
A. Yes sir.
Q. And you don't gauge these wells separately?
A. No sir.
Q. But estimate the total production from the three tanks?
A. Yes sir.
Q. And make the estimate as to what each well is doing.
A. Yes sir.

Recross-examination.

By Mr. COOK:

Q. What is the capacity of these three wells that the oil from the Jennie Archilla allotment is placed in—these tanks?
A. What is which?
68 Q. The capacity of these three tanks.

Mr. ZEVELY: Three sets of tanks; clusters of tanks.

Q. What is the capacity of the tanks?
A. Battery one and two is two-sixteen hundred barrel tanks, in battery one and two.
Q. That is 64 hundred barrels in all.
A. Battery No. 3 has two 250 tanks.
Q. That is five hundred; that is all?
A. Yes sir. That is, except just flow tanks, that the wells flow into.
Q. How much oil have you in those tanks at the present time?
A. Well, I can't say until I gauged them.
Q. How much of the oil production from this Jennie Archilla land is taken by the pipe line?
A. Well, I would have to go back and figure that; look it up.
Q. Don't you know what per cent. of the oil they take from you?
A. They are supposed to take about thirty per cent.
Q. Well, do they take any more than 30%?
A. Well I don't know as they do.
Q. You don't know that they don't, either, do you?
A. Well, no, I don't because that is up to them.
Q. Have you any idea, Mr. Martin, as to the total production of

the four wells lying two hundred feet north of the Eva Waters land, which we have been talking about?

Mr. ZEVELY: We object to that question for the reason that he has testified to it at least half a dozen times.

Q. Answer the question subject to the objection.
A. You mean the four wells on the line?
Q. No the four wells originally drilled in there, last of August and September, the total production since they were originally brought in.

Mr. ZEVELY: Oh, I didn't understand that question.

A. What they produced since they were brought in?
Q. Yes sir.
A. Oh no.
Q. I just asked you if you have any idea.
A. No, I haven't.

W. A. MARTIN.

P. J. WHITE, first being duly sworn, upon his oath, deposes and says as follows:

On direct examination.

By Mr. ZEVELY:

Q. State your name and occupation and residence, Mr. White.
A. P. J. White; supply business and also the oil business, and reside in Tulsa, Oklahoma.
Q. How long have you been engaged in the supply business—oil well supplies?
A. Yes sir. Twenty years.
Q. Twenty years in the oil well supply business?
A. Yes sir.
Q. And how long in the production business, production of oil?
A. Well, I should judge six or seven years; six years.
Q. Mr. White you are one of the lessees, together with others of the Herman Knight, in the thirty acres of land here in controversy, which has already been described, are you not?
A. I am.
Q. Mr. White, did anybody—first, who are your associates?
A. Why, Thomas White, in the thirty.
Q. In the thirty?
A. At the time the lease was taken, Thomas White and W. T. Lewis.
Q. W. T. Lewis?
A. Yes sir.
Q. What persons were interested with you in this thirty acres in March and April of this year?
A. Well, Mr. W. F. St. Clair, Thomas White, and myself.
Q. Who, if any of your owners of this lease, negotiated with

Charles Waters, the guardian of Eva Waters, looking to a compromise of the contest case?

A. I did.

Q. Which was then pending between Herman Knight and the minor, Eva Waters?

A. I did.

Q. Did anybody else—did either of the other two associates or any agents have anything whatever to do with the negotiations?

A. No sir.

Q. Then whatever negotiations were had with Charles Waters and whatever representations were made to Charles Waters—they were made by you?

A. Yes sir.

Q. And if anybody else made any representations of any character, touching this compromise to Charles Waters, it was made without the authority of you and your associates?

A. It was, yes sir.

Q. In your negotiation with Mr. Waters, what did you represent to him as the production of wells in the immediate vicinity and surrounding the Herman Knight thirty, with the purpose of fixing in his mind a value for the thirty acres in consideration of which his child would withdraw her filing on that thirty acres?

A. Well, I made no representations with the end in view that it would fix the value; I wanted him to make a price to us; we wanted to buy it, but he did ask me questions what the wells were doing and I told him the wells on the north line, the corner well we call number one, was doing about one hundred and twenty-five barrels, in my opinion.

Q. That was in April?

A. That was, I think, in April, and the others were doing less than that; the lowest, I think I represented, was doing seventy-five barrels; that was on the ten acre piece, east from the one hundred and twenty-five; about seventy-five. I got it a little too high.

Q. Your view now is that your estimate you gave him of the production of the surrounding wells was greater than the production as it was?

A. As it was, yes sir.

Q. You didn't make any representations whatever to Mr. Waters, then, with reference to the value of his——

A. Oh no; I desired him to put a price on it.

Q. That came from him and not from you.

A. Well, of course, I opened the negotiations to ascertain what he would do.

Q. Mr. White, we gave notice as you know that we would offer the testimony at this time, or at this place of J. I. Gillespie,
70 David Connolly, William M. Moiser, E. I. Perry, H. P. Anderson, and Thomas Cates. Do you know where Mr. Gillespie is?

A. He is on a vacation.

Q. How long has he been there?

A. I should judge six or eight weeks.

Q. Been away six or eight weeks?

A. Yes sir.
Q. Do you know where he is?
A. I understood one of the Gillespies—which one?
Q. J. I.?
A. I understand he is in Colorado.
Q. Mr. Connolly was here. Do you know anything about Mr Mosier?
A. He is on a vacation.

Mr. COOK: I object to that line of testimony, unless it is shown for what purpose——

Mr. ZEVELY: The purpose is this: On cross-examination the witnesses here yesterday—you gentlemen took occasion to enquire of practically every one of them whether they had been here since June. We finally concluded the purpose was to show that when we had been making representations to the Department and the courts, that we were misleading them as to the facts, that we were not able to get our witnesses, and we simply desired to show that we subpœnaed this multitude of witnesses, most of them were away, and that we were acting in the best of good faith, and in no effort to deceive the court about that.

Q. Now you can state about Mr. Mosier.
A. He is on a vacation.
Q. How long has he been gone, do you know?
A. I should judge he has been away about eight weeks.
Q. Do you know where he is?
A. It is reported he is in the northwest, wandering around the country.
Q. Seattle and other places?
A. Seattle and other places; I think he went on an excursion.
Q. Mr. H. P. Anderson was subpœnaed here.
A. He is on a vacation.
Q. We changed the notice, rather gave additional notice that we would have his testimony taken at Washington; why was that?
A. Because he was on a vacation in Vermont, nearer Washington than to this place.
Q. Now, in further notice, Mr. White, we inserted the names of T. O. Cremin, W. A. Martin, J. W. Sloan, E. F. Blaze, J. O. Mitchell, C. S. Avery, Thomas White, P. J. White. Do you know anything of the whereabouts of Mr. Cremen?
A. Well, he is on a vacation; he is in Ohio, I understand.
Q. Wasn't possible for us to have him here?
A. No sir.
Q. Know anything about Mr. Sloan?
A. Why Mr. Sloan has been on a vacation for, I should judge, three or four weeks, but I understand he is in the city now: Just returned a few days since.
Q. What about Mr. E. F. Blaze?
A. He is on a vacation; he is up at Macanac Island.
Q. What about C. F. Avery?
A. He is on a vacation.
71 Q. Know where he is?
A. It is reported that he is somewhere in Missouri.

Cross-examination.

By Mr. COOK:

Q. Mr. White, when did you first become interested in the Eva Waters allotment?

A. Well, I think about a year ago, a little over a year ago.

Q. Thomas White your brother?

A. Yes sir.

Q. You say you conducted all the negotiations relative to the purchase of this land personally with Charles Waters, the father and guardian of Eva Waters?

A. Yes, I negotiated the business for ourselves.

Q. When did you first see Mr. Waters relative to this matter?

A. Well, I think in April last; I think it was in April, might have been in March.

Q. You say that these parties—Mr. Gillespie, Anderson, and others, are away on their vacations?

A. The parties I mentioned are on their vacation.

Q. When did Mr. Mosier go away?

A. It is my understanding, and I believe I read it from the papers, he went on the Elk Excursion, which left here for Los Angeles, I think, it was the 5th of July.

Q. When did Mr. Gillespie go away?

A. Well, Mr. Gillespie—which Mr. Gillespie do you refer to?

Q. Jesse?

A. Jesse Gillespie—well, I should judge probably the middle of July; that is a fact—I know that he was going away from here, because I had some business negotiations with him and they were suspended until his return. That is, through a third party.

Q. Know of your own knowledge that he went away the middle of July, Mr. White?

A. About that time.

Q. When did Mr. Anderson go away?

A. Well I can't say when Mr. Anderson went, but he has been gone, I should judge, at least two months. That would bring it early in July?

Q. When did Mr. Cremen go away?

A. Mr. Cremen went right recently.

Q. How long ago?

A. I should judge about a week ago.

Q. That would be since the middle of August.

A. I think it is really more recent than the middle of August. Middle of August would be about a——

Q. When did Mr. Blase go away?

A. Well, Mr. Blase has been away twice; once in July and again this month, both times to Macanac Island, taking his vacation, I guess he was recalled here for some reason. His wife has been up there, I understand.

Q. When did he go back?

A. Well, I think he was back here in fact I know he was here the latter part of August, the latter part of July.

Q. How long was he here then, do you know?

A. I should judge he was here a couple of weeks.

72 Q. Went away then about the middle of August again?

A. Now I can't say just when he went away.

Q. When did Mr. Mitchell go away?

A. Well I can't answer that question; I will say that Mr. Mitchell was away, and I think he left here early in August, I believe.

Q. What about Mr. Avery? Did you testify as to Mr. Avery being away?

A. I can testify. Haven't seen or talked to Mr. Avery for at least six weeks; I don't meet him very frequently.

Q. Are you in any way interested in the land in this controversy, known as the Twist-Waters 20 acres?

A. No sir.

Q. Only in the Knight-Waters thirty acres?

A. Yes sir.

Q. You signed this petition in this mandamus proceeding, Mr. White, as attorney in fact, didn't you?

A. No sir.

Q. Do you know who the original complaint in this proceeding was filed by, the petition for mandamus?

A. Herman Knight.

Q. The original?

A. Thomas White filed the first original complaint, under power of attorney from Herman Knight.

Q. And as your attorney Mr. Zevely stated, the records will show the amended complaint signed by Mr. Knight himself.

A. So Mr. Zevely states.

Mr. ZEVELY: Mr. Notary, I desire to move to strike all the testimony elicited on cross-examination touching subjects which were not brought out on the direct-examination in chief.

Q. Mr. White have you done any work towards operating this Eva Waters land?

Mr. ZEVELY: Now I desire to object to the question for the reason that it does not touch a subject which was brought out in the direct-examination of Mr. White, and that therefore it is incompetent for the counsel to ask the question, and I shall ask the Notary to rule on that proposition.

Mr. COOK: Mr. Zevely, you don't mean to say the Notary can rule out a question in a proceeding of this kind?

Mr. ZEVELY: I can ask him to do it.

The NOTARY: As the Notary understands the law, he has no authority to rule upon any objection made by counsel in the taking of a deposition, but he is willing to hear any authority submitted upon the proposition, because he may be mistaken.

Mr. ZEVELY: I will not offer any authorities. You can pass on it.

Q. All right, Mr. White. For the purposes of oil development?

A. We have.

Q. Please state what that work consists in?

A. We first—the first work was the drilling of a well under a conditionally approved departmental lease, approved by the Secretary

of the Interior, Mr. Garfield. Approved conditionally. The next work was at the time that the case—sometime after May 10th, after the case—after he approved—after Pierce approved this confession of judgment.

Mr. SMITH: May 10th, 1909, you mean?

A. Yes, May 10th. When he approved the confession of judgment our attorneys wired us the matter was settled and he
73 also told us the conditions, told us the amount of money to pay and told us the time when it was necessary to have it there, which was the 15th, and told us to see the operations.

Q. And what did you do relative to improving — developing of that land?

A. Well, we started drilling two wells; erected rigs and drilled one well to the depth of four hundred feet, about; approximately four hundred feet.

Q. When did you do that, Mr. White?

A. I can't give you the date.

Q. Well, about it?

A. Well, it was sometime, I think either the latter part of May or early in June.

Q. What year?

A. 1909.

Q. What part of this Eva Waters allotment was that drilling done on?

A. On the part of it which was claimed by Herman Knight. Of course we started this work—understand, by drilling I mean the actual drilling of wells; beginning of the operations construction, etc., that was proceeded with sometime previous; I don't remember what time.

Q. Know what part of that thirty acres of the Herman Knight land that was?

A. On the northeast ten.

Q. Have you got any other improvements out on that land, Mr. White?

A. Yes, we have a house on it.

Q. What kind of a house?

A. Well, it is not a very substantial affair, however. It is a house we built there for the protection of a man living there and also a tent. Couple of tents.

Q. When were they put there?

A. Well, I believe we built the house sometime in June.

Q. This year?

A. Yes sir.

Q. What part?

A. Well, I think about the middle of June.

Q. Didn't you drill this well about that time, too?

A. I think that we built the house and that we had suspended drilling, and then about the time we erected the house. In fact, I am sure of that.

Q. Did you commence drilling of this well in May or in June?

A. Now, I can't answer that definitely. I am not in charge out

there. While I am interested in the property, I don't go out there very frequently, probably once a month.

Q. When did you authorize the drilling of that land, Mr. White?

A. Well, a short time after we received this decision; received this notice.

Q. Notice of what?

A. Notice that Secretary Pierce had approved this confession of judgment.

Q. Was it after the 21st of May?

A. Well, I am not positive as to the—I can't say, I am not competent to testify on that particular point as to the time.

Q. You have a family in that house out there, have you not, Mr. White?

A. Well, I can't say; there is a person there; I can't say whether there is a family or not; there is a man there.

Q. What is that man's duties?

A. Well, his duty is to protect our interest and I think he *is* also been employed on the adjoining property; roust-about and general laborer.

Q. Did you do any work relative to the drilling that was done immediately north of this land on the Jennie Archilla land?

74

A. I didn't quite catch that question.

Q. Did this man living on this land now, do any work on the—in connection with the drilling or building derricks on these three wells immediately north?

A. I don't know. See I have nothing whatever to do with the man. We have a manager; one of my partners in interest is manager of the property, and I am employed in the supply business; don't pay much attention to the oil business.

Q. That man put out there for the purpose of holding possession of this property?

Mr. SMITH: We object to that because it is irrelevant, immaterial, incompetent, and does not tend to prove any issue in this case.

A. The man was put out there not to protect this property only but adjoining property, and look after our general interest in that part of the field.

Q. Have you issued any instructions to this man relative to keeping anybody off of this land?

A. Have I?

Q. Yes.

A. No sir.

Q. Has anybody in connection with your company?

A. I don't know.

Q. Was this man put out there for that purpose, Mr. White?

A. I would say that he was placed there for the purpose of protecting the property against fire or trespassers or anything else. I presume that would be his duty.

Q. Did you ever authorize Thomas Cates to go to see Charles Waters in your behalf relative to having Waters sell this property to you?

A. No sir.

Q. If Cates testified to that effect yesterday, is he mistaken?

Mr. SMITH: I object to that because it is not the duty of a witness to testify and pass upon the testimony of other witnesses; he can give his statement and the other man gives his statement, and the court will judge as to who is mistaken.

A. Mr. Cates came to me personally to investigate the value of this property, in order to qualify himself to make recommendations of its sale to Charles Waters; recommendation of the sale to ourselves.

Q. Did you call Cates up over the telephone asking him to come down here with that idea in view?

A. No. However, I talked with Cates over the phone; I will explain that.

Mr. ZEVELY: I intended to interpose an objection, because of the uncertainty of the question. Not definite enough as to time, place, or anything else to elicit an answer from the witness. Let him make the question more definite.

Q. Did you at any time call up Mr. Cates over the telephone and talk to him relative to this matter?

A. I talked with Mr. Cates over the telephone in relation to a trip to Tulsa, from Lenapah, to Tulsa, which I supposed he was
75 going to make; I would much prefer to explain this particular point. There is nothing particular to cover up. Mr. Waters told me that he had a friend named Tom Cates at Lenapah, and he suggested that I see Mr. Cates in regard to this matter, and I told him I didn't know Mr. Cates, and didn't care to go to Lenapah; that if he wanted to settle the matter and dispose of his piece of the property, he could see Mr. Cates, if he choose and have Mr. Cates see me, and he said then he would call Mr. Cates and have Mr. Cates come to Tulsa and meet me, and go over this property. That was on a Saturday. I arrived home here on Sunday. Sunday afternoon I found that I would have to—I was supposed to leave the city the following day, in regard to my supply duties—I travel a good deal from branch store to branch store under my charge—and I thought it would be advisable to find out just when Mr. Cates was coming here, or if he intended to come at all, so I called him over the phone and asked him if Mr. Waters talked to him in regard to coming here, and he said he had, and I asked him when he was comnig and he said I can come any time, not particular. And I said I would like to go away from here, and like to get the thing off my hands, and I said if convenient why not come over tonight, Sunday, night; we can go out there Monday and dispose of the matter, and then I will be at liberty. He said he would do that, and he came to Tulsa, I think Sunday night on the nine o'clock train, and the phone conversation referred only to the time *which* he expected to come here.

Q. Do you know whether or not Mr. Cates went out on this Eva Waters land after he arrived at Tulsa?

A. He did.

Q. Did you accompany him?

A. He was in my company, yes.

Q. Did you tell him anything relative to the production of any wells surrounding this land?

A. Well, he asked me questions in regard to the production of the wells around the land and in fact of the whole property, and he stated that the wells were practically the same kind of wells that he had on his property; he had a great many wells to come in quite large, three or four or five hundred barrels, and depreciated of course in production rather declined in production, and he seemed to be very familiar with oil properties in general, and I was somewhat surprised to learn that he had been so fortunate in getting these wells on his own property, and he asked me as to the production of the wells along the line, and I told him what they were doing, approximately.

Q. Did you tell him the production of the wells on all sides of this land, Mr. White?

A. Oh yes, he made a plat. Made a little plat on a piece of paper there, and questioned me very closely, not only as to the production but as to the general characteristics of the field. Seemed to be qualified probably more so than I was to pass on——

Q. What, if you recollect, Mr. White, did you tell Mr. Cates as to the general production of the wells in the vicinity of this land?

A. Well, I indicated each well by pointing to them, stood
76 at a high place on the Herman Knight—point there and I pointed to each well, and told him approximately the production.

Q. What did you tell him the production, if you recall?

A. I told him the Number One well was doing approximately one hundred and twenty-five barrels, and I thought the other would average a hundred barrels.

Q. What do you refer to as No. 1 well?

A. In the southwest corner of the Jennie Archilla.

Q. Lying two hundred feet from the line?

A. Yes sir.

Q. After Cates had gone on this land with you and you had advised him as to the production, Mr. White, did you then authorize him to see Waters relative to having Waters sell this land to you?

A. No sir; I authorized him to do nothing. He came there for the express purpose to investigate this land for Waters. At any rate Waters told me that he would send him to me for that purpose, that is to Tulsa for that purpose, and he told me that he was here for that purpose.

Q. Was there anything said by you to Cates relative to what price he should tell Waters to sell this land for?

A. We discussed the price, rather he wanted us to discuss it, and of course I took the position that it was Mr. Waters' land, and for that reason I invited the proposition from them, and I felt they should set the price on it.

Q. Did Waters make you any proposition?

A. Yes, Waters made us a proposition; that is, subsequent to this visit here.

Q. Of Cates, subsequent to Cates' visit?

A. Yes.

Q. Was your purpose in telling Cates the production of these wells given with an idea in view of having Waters place or having something to estimate a value of this land by?

A. No sir; there was no contract for the purchase of the land, and it was rather improbable that we would buy the land. Therefore my interest was not to place a value on it; it was simply to inform him.

Q. You defrayed Cates' expenses for that trip, did you not Mr. White?

A. We did. I want to explain that. Might do it here. We defrayed Cates' expenses as a part of the consideration for this property. This agreement being made when we agreed to pay twelve thousand dollars for the property.

Q. Well, now, you testified just now, if I understood you correctly, that there had been no agreement for the purchase of this property, and that you didn't think there would likely be any.

A. I referred to that particular time. I mentioned that this was subsequent to that time, after Mr. Cates had gone to Mr. Waters and made his report I presume, and had agreed to name us a price.

Q. Well, didn't you and Cates go immediately from here to Muskogee after you went upon this land, where you met Waters?

A. Cates communicated with Waters, I think, the same day. I don't know what the nature of his communication was. He, I presume, told him to go to Muskogee. At any rate, Cates said we will go over there and see Waters, and we did. We went to Muskogee and Cates met Waters and sometime in the evening, not hearing from them, I went around to see if I could find them. I
77 didn't know where they were. And so I found them at the Katy Hotel. Mr. Cates and Mr. Waters, and Mr. Cates—I asked him if they had come to any terms, on the matter, and he said well they had talked it over quite generally, and that Mr. Waters was willing enough to sell at the right price, but was somewhat fearful that his attorneys would retaliate and cause him trouble, so I talked with Waters then and he stated he had had some trouble at some time in the Territory and that they had defended him.

Mr. ZEVELY: Did he mention the name of these attorneys?

A. Starr & Patton, and they had told him if he tried to relinquish this property that they would send him to the penitentiary.

Q. What sum did you pay to Cates for the expenses, Mr. White?

A. One hundred dollars. We paid that two or three days ago. I would say this: I would like to add, that we paid him—gave him a check for a hundred dollars, and that we expect some return from that. We were to pay his actual expenses whatever they might be. We agreed with Mr. Waters—Mr. Waters stipulated that. He said he was a poor man, and couldn't afford to do these things, so that we agreed to pay this man's expenses. He required us to pay it.

Q. Did you have all the witnesses subpœnaed that have been read here, by your attorneys as having been in the notice of the taking of the depositions?

A. This present deposition?

Q. Yes.

A. I was active in it.

Q. Do you know whether subpœnaes issued for all of the parties or not?

A. I don't know; I furnished the names to Mr. Zevely and Mr. Smith and Thomas White, my brother, looked after the subpœnaes.

Q. Are you connected with any — the following oil companies: Hiland Oil Company?

A. No sir.

Q. Los Angeles-Cherokee Oil Company?

A. No sir.

Q. Little Rock Oil Company?

A. No sir.

Q. The Alpine?

A. Yes sir.

Q. The Justin?

A. Yes sir.

Q. To what extent are you interested in this Jennie Archilla allotment?

A. What is my interest in it?

Q. Yes sir.

A. One-quarter interest.

Q. Do you know how far wells are usually drilled apart, Mr. White?

A. Well, there is no particular rule. I would say that under favorable conditions, rather normal conditions, the rule is I think down here to drill wells one hundred and fifty feet from the line.

Q. How far were these four wells you brought in last year north of this Waters?

A. They were brought in two hundred feet from the line, owing to a provision in the Department lease requiring them to be placed exactly at that point; rather, exactly at that distance.

Q. You have been in the oil business some time, have you not, Mr. White?

A. Yes.

Q. Well, from your experience in the oil production, do you believe that the four wells you originally placed on this land were sufficient to have drawn the oil within two hundred feet from each side of them?

A. Well, I believe I would say that the wells probably in the course of two years might drain a couple of hundred feet yes. That is merely belief; I don't know anything about it, of course.

Q. What was the object of your company then, Mr. White, in drilling three wells inside of that two hundred feet—four wells inside that two hundred feet towards——

A. Why, it was to get all the oil that we possibly could out from under our land.

Q. Did you have any object in view relative to getting all you could out from under the Eva Waters land?

A. Well, of course we didn't have an object of that kind in view. We drilled these wells on our own land on our own property. I might add this, that the Little Rock Oil Co. who owned the property adjoining the Knight farm, or this Waters allotment, came down on our line and drilled within fifty feet of it, that is, within fifty feet of the Waters line. The Hiland Oil Company, which is largely owned by Mr. McFarland, owned the property adjoining the William Twist land, and they had drilled within fifty feet of the line. We felt that if this controversy might be decided against us, that probably whoever acquired the land would come right up against our line, because it seemed to be the practice in that particular field. So we drilled those wells there with that feeling and of course you might say prompted by the drilling that had been done in that particular district by these people.

P. J. WHITE.

Mr. ZEVELY: Mr. Cook this map which I have offered was made last Monday. If you will admit that fact, I won't have to recall that witness to show that.

Mr. COOK: That is a map introduced as plaintiff's exhibit "A"?

Mr. ZEVELY: Yes, was made, as a matter of fact, last Monday, August 23rd.

Mr. COOK: That is satisfactory.

Mr. ZEVELY: Just save bringing the witness back.

Mr. COOK: Yes sir.

Mr. ZEVELY: That is all today.

(Here follows plat marked Plaintiff's Exhibit A, page 78.)

MAPS

TOO

LARGE

FOR

FILMING

79 Filed September 2, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808. Mandamus.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Interior,

and

At Law. No. 51809. Mandamus.

THE UNITED STATES OF AMERICA ex Rel. WILLIAM J. TWIST
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

Stipulations.

It is hereby stipulated that the deposition of J. George Wright, taken at Muskogee, Oklahoma, on the 26th day of August, 1909, before Chester A. Cowper, Notary Public, may be read and considered with like force and effect as if the same had been signed by him.

This stipulation is made by reason of the fact that Mr. Wright had an appointment in St. Louis, Missouri, and was unable to remain in Muskogee for the purpose of signing his deposition and may not return before it is necessary to forward the deposition, and he stated that he was willing to have his testimony, taken and transcribed by the stenographer, read with like force and effect as if he had signed his deposition.

Witness our hands this 27th day of August, 1909.

ZEVELY, GIVENS & SMITH &
E. R. PERRY,
Attorneys for Relators.
J. CARTER COOK,
Attorney for Respondent.

* * * * * * *

It is hereby stipulated and agreed by Zevely, Givens and Smith, attorneys for the relators, and E. R. Perry, attorney for William J. Twist, and J. Carter Cook, attorney for the respondent, as follows:

The depositions of witnesses in behalf of the relators taken at Tulsa, Oklahoma, on the 24th and 25th of August, 1909, at Muskogee, Oklahoma, on August 26, 1909, and all subsequent depositions, shall be read in evidence subject to all objections, when read, to the same effect as if the witnesses were personally present and testifying, and the said depositions shall be read in evidence at the hearing of each of the causes pending in the Supreme Court of the District

of Columbia and numbered 51,808, and 51,809, without ob-
80 jection as to notice, certification and return, and no motion to quash said depositions, or either of them, will be made by the respondent.

Witness our hands this 26th day of August, 1909.

ZEVELY, GIVENS & SMITH,
E. R. PERRY,
Attorneys for Relators.
J. CARTER COOK,
Attorney for Respondent.

* * * * * * *

STATE OF OKLAHOMA,
County of Muskogee, ss:

Be it known, that an examination of witnesses begun and held on the 26th day of August, A. D., 1909, when the depositions hereto attached were taken, I, Chester A. Cowper, a Notary Public in and for the state and county aforesaid, did cause to be personally present before me at the offices of Zevely, Givens and Smith, in Muskogee, Oklahoma, the following named witnesses, viz: J. George Wright, D. H. Bynum, and James M. Givens, to testify on the part and behalf of the relator in a certain cause now pending in the Supreme Court of the District of Columbia, wherein the United States of America, on the relation of Herman Knight and William J. Twist, respectively, is relator, and Richard A. Ballinger, Secretary of the Interior, is respondent; it being agreed by and between the parties; that the testimony here taken shall apply to both causes Nos. 51,808 and 51,809; that the testimony shall be reported and transcribed by Giles A. Penick, instead of by the Notary Public.

Present on behalf of the relator, Messrs. Zevely, Givens and Smith, and Mr. E. R. Perry; and on behalf of the respondent, Mr. J. Carter Cook.

The witnesses above named, being of lawful age, were by me sworn before any question was put to them, to tell the truth, the whole truth, and nothing but the truth, relative to said cause, and thereupon the said witnesses deposed and said as follows:—

J. GEORGE WRIGHT, first being duly sworn, upon his oath, deposes and testifies as follows:

On direct examination.

By Mr. ZEVELY:

Q. State your name, please, and occupation and residence.

A. J. George Wright; Muskogee, Oklahoma. Commissioner to the Five Civilized Tribes.

Q. How long have you been down here, Mr. Wright?

A. Eleven or twelve years.

Q. How long have you been Commissioner to the Five Civilized Tribes?

A. Two years.

81 Q. You were Commissioner in May, 1909?

A. Yes sir.

Q. I will ask you whether or not you received on May 11th, 1909, or about that date, the following telegram from the Secretary of the Interior:

Mr. COOK: I think if the contents of this telegram is introduced,—the telegram is in existence, and it is the best evidence, and this copy is not; I object to it.

Mr. ZEVELY: I have not offered it at all; asked him if he received that telegram.

A. That telegram was not received by me; I was not here at the time.

Q. Was it received at your office, if you know?

A. It was received at the office, yes sir.

Q. By whom?

A. By Thomas Ryan, Acting Commissioner.

Q. Did you afterwards see this telegram?

A. Yes sir.

Q. What was this—the last word but two prior to the signature of Mr. Pierce. Acting Secretary, reads "promised" here; what did your telegram read?

Mr. COOK: I objection to the testimony from that copy, for the reason that there is considerable controversy as to the wording of that telegram——

Mr. ZEVELY: I didn't ask him what this read. I said what does your telegram read.

Q. Read the question.

A. My recollection is that the original telegram was worded the same.

Q. Did you ever have any correction of that telegram?

A. Not that I recollect.

Q. When you—how long after the receipt of this telegram did you get back to your office? This was on May 11th.

A. June 18th.

Q. June 18th?

A. Yes sir.

Q. What if any action had been taken by your office under this telegram?

A. The record showed that the conditions in that telegram had been complied with.

Q. In what manner?

A. By preparing and executing deeds referred to and sending them to the Department.

Q. Was the deed prepared by——

A. The deeds—all deeds are prepared——

Q. Was this deed prepared here, as directed in this telegram, and sent to the Chief to be signed?

A. That is my understanding, but I have no personal knowledge.

Q. Your records show that?

89

A. Yes sir.

Q. Do your records, if you know, show that such a step was taken with reference to any other tract of land or allotment in the Cherokee Nation, or other of the Five Tribes?

Mr. COOK: I object to that as irrelevant, incompetent, and immaterial, and has nothing to do with the issues in this mandamus proceeding. I further object to the testifying as to any records,
82 unless the records or certified copies are introduced, as they are the best evidence, and this testimony is not competent.

A. I can not say.

Q. As a matter of fact, Mr. Wright, in your experience as Commissioner, was the—was this situation ever there before—did anybody ever before have a deed signed under orders from Washington —from the Secretary?

Mr. COOK: I object to that, as it has no bearing on this particular case.

A. I don't recollect any instance.

Q. So far as your knowledge of the records is concerned, there is not an instance prior to this one?

A. So far as my recollection is concerned.

Mr. COOK: I submit, again, that the records of the office are the best evidence.

Q. Did you ever receive these checks—this money called for by this telegram?

A. Received at my office, yes sir.

Mr. COOK: I think, Mr. Zevely, it would be better to have a more definite question as to the checks.

Mr. ZEVELY: He was not there, and I want to show that he was not there. The telegram speaks for itself.

Q. Mr. Wright, do you know Mr. Serven?

A. Yes sir.

Q. Do you know his initials?

A. I don't think I know his initials.

Q. Do you know his occupation?

A. I understand he is an attorney in Washington.

Q. Do you know the firm to which he belongs in Washington?

A. I don't know the style of the firm; McGowan, Severn & Mohun, I think.

Q. At this inquiry—at the taking of this testimony at Tulsa yesterday and the day before, Mr. Serven has been present and active—participating, suggesting to counsel of record in this case; do you know whether or not he has any authority to represent the Secretary of the Interior in this suit?

Mr. COOK: One minute, Mr. Wright, please.

A. I saw a letter (Mr. Cook hands witness letter), addressed to Mr. D. H.—Dana H. Kelsey, dated August 20th, 1909, from——

Q. You are reading from that now, are you?

A. Yes sir. From Lawlor, Assistant Attorney General of the Department of the Interior.

Q. Well, just read it into the record.

A. Which is as follows——

Q. Yes, read it.

A. Mr. Dana H. Kelsey, United States Indian Agent, Muskogee, Oklahoma. Dated at Washington, August 20th, 1909. Sir: This will be handed you by Mr. S. R. Serven, of the firm of McGowan, Serven & Mohun, attorney for the guardian of Eva Waters. Mr. Serven is familiar with all the facts involved in the contro-
83 versy between Knight and Twist and his client, and goes to Oklahoma for the purpose of offering such aid and assistance as such familiarity will render possible, in connection with the depositions shortly to be taken in the cases of Knight and Twist against the Secretary of the Interior. Mr. Serven will be glad to co-operate in any way, and you will therefore call upon him to whatever extent you deem proper. Very respectfully, Oscar Lawler, Assistant United States Attorney.

Q. Mr. Wright, I enquired of you—this telegram of May 11th, of which I presented you a copy. Can you bring that original telegram?

A. Yes sir.

Q. Well, we would like to have that. Is this a correct copy? How does that word read at the bottom?

A. The same.

Q. Let this be read into the record, Mr. Wright.

A. The telegram I have, which I here present is the original telegram; copy it in.

Mr. COOK: (Reading telegram presented by witness): Washington, D. C., May 11, 1909. Ryan Acting Commissioner, Muskogee, Oklahoma. Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight, respectively, upon payment of Twenty-five thousand dollars for use of miner Waters. Contestants given including 15th to make payment upon receipt of thirteen thousand more within time allowed. Forward entire twenty-five thousand to department, endorsed to Secretary, when entire funds received by you. Prepare deeds to respective contestants, and have them executed and forwarded here for approval. Report promised by wire. Signed Frank Pierce, First Assistant Secretary. Eleven thirty-five a. m., over the Western Union Telegraph wire.

Mr. SMITH: Mr. Cook, let's stipulate that which is read in is taken in lieu of the original, so that we won't have to remove the original from the files.

Mr. COOK: It is hereby agreed between counsel that the telegram above read into the record is done—was for the purpose of not taking the original away from the files of the office of the Commissioner to the Five Civilized Tribes, and that said telegram as read shall have the same force and effect as the original; is a true copy and shall have the same force and effect as though the original were introduced.

Q. Mr. Wright, do the records of your office show whether or not

the firm of McGowan, Serven & Mohun, at Washington, were attorneys, or are attorneys for the Olympus Oil Company, and asserted that they were attorneys for Charles Waters, as guardian of Eva Water, a minor, in two contest cases pending either in your office or at one of the offices in Washington, known as Charles Waters, guardian of Eva Waters, minor, against William J. Twist and Herman Knight?

Mr. Cook: Object to that question as incompetent, irrelevant, and immaterial, and as not bearing on the issues of this proceeding.

A. I cannot say without an examination of the records; my recollection is that the records would not show that, but I am not positive.

84 Mr. Smith:

Q. Mr. Wright you were asked about what the record showed with reference to whether or not there was any other instance as to a deed having been ordered, previous to the issuance of certificate of allotment, and under the direction of the Secretary of the Interior. Now, without reference to the records, I want to ask you if, since you have been Commissioner, there has within your knowledge, ever been a deed issued in that way—I mean executed by the Chief in that way.

Mr. Cook: Objected to for the reason that it has no bearing on this particular case.

Q. Go ahead and answer.

A. I do not recollect any, but this time.

Q. Mr. Wright the matter of permitting a relinquishment is a usual practice in your Department is it not?

A. Yes sir; each case is considered for itself.

Q. There have been many instances of withdrawal of application by one party or the other, in contest cases, have there not?

A. Yes sir.

On cross-examination.

By Mr. Cook:

Q. Mr. Wright is it as common a custom to permit minors to relinquish or confess judgment in contest cases as it is adults?

A. Not as a rule, no sir.

Q. Mr. Wright have you seen this deed that you have been questioned about of which the relator in this mandamus proceeding alleged was executed by the Secretary?

A. No sir.

Q. Do you know of your own personal knowledge whether or not the Secretary ever approved that deed?

A. No sir.

Q. Have you ever seen that deed, Mr. Wright?

A. No sir.

Q. Mr. Wright were you present on or about the 25th day of May, 1909, in Washington City, during a conversation had between the Secretary of the Interior and Mr. E. R. Perry, of Tulsa, relative to

the people whom Mr. Perry represented taking possession and drilling this Eva Waters allotment for oil?

A. I was there——

Mr. SMITH: Just a moment. We object to the question for the reason that it is not proper cross-examination, and unless counsel upon the other side desire to make Mr. Wright their witness, this testimony could, of course, have no place here.

Mr. COOK: On behalf of the respondent, I contend that the question is wholly relevant, by reason of the fact that their own witness, Mr. Perry, testified at a former proceeding in Tulsa—at a former hearing in this proceeding, at Tulsa, to the fact that Mr. Wright heard such conversation by Acting Secretary Pierce, giving to Mr. Perry——

Mr. SMITH: The rule is as to any witness on the stand you can only cross-examine upon subjects asked that witness. This witness has been asked to testify to no such conversation. It cannot
85 be proper subject for this record, unless the witness is made the witness of the respondent.

Mr. COOK: Respondent joins issue on the proposition, and asks that the question be answered.

A. I was present at a number of conversations with the Secretary at the hearing there; what particular directions the Acting Secretary gave or instructions or authority to Mr. Perry, or others, I do not now recollect.

Q. Mr. Wright, do you know Alexander Hamilton?

A. Yes sir.

Q. Did he ever work under you?

A. Yes sir.

Q. What was his official position?

A. Oil Inspector.

Q. Did Hamilton ever make a report to you on or about April 17th, relative to the oil production of wells contiguous to the Eva Waters allotment?

A. Yes sir.

Q. Mr. Wright, will you look at this report and see if that is the report that was made to you by Mr. Hamilton, in an official capacity?

A. Yes sir.

Mr. COOK: I am going to offer to have it read in the record.

Mr. SMITH: We object to the offer for the reason that we have not interrogated this witness upon that subject, and it is not proper cross-examination, and it is clearly evidence in behalf of the respondent. Now, if counsel desires to offer it as such, we will not object to the fact that they gave us no notice of this testimony at all.

Mr. COOK: Counsel for respondents ask — it be read into the record, subject to the objection of relator's attorney.

Mr. COOK (reading from paper):

DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE, UNION AGENCY,
MUSKOGEE, OKLAHOMA, *April* 17, 1909.

Honorable J. George Wright, Commissioner to the Five Civilized Tribes, Muskogee, Oklahoma.

SIR: Receipt is acknowledged of your letter of April 14th, 1909, wherein you request that an investigation be made of the land hereinafter described relative to the capacity of wells on the adjoining lands; the probable amount of drainage caused by same; the injury the land has suffered as a gas and oil mining proposition by reason of this, and the probable injury of same within the next six or eight months; also the present monetary value, and the value of one-eighth royalty interest of an oil and gas mining lease on the property. I have the honor to report that I have visited the premises and find that there are sixteen producing wells on lands adjacent to this property, with the daily capacity as follows:

Four wells, fifty feet from the west line of the property in question, with a daily capacity of three hundred barrels each. Two of these wells are on the allotment of Ruth T. Brady, and two on the allotment of Henry T. Brady. Both of these Brady leases were removed from Departmental supervision by order of court of Rogers County, on November 9, 1908, and are under operation by the Island Oil Company. These wells were brought in about four months
86 ago. One well adjacent to the southwest corner of the property, being on the allotment of William G. Twist, leased by the Los Angeles-Cherokee Oil Company. This lease was removed from Departmental supervision on March 2, 1909, by filing of bond running to lessor. This well is located one hundred and fifty feet from the line, and has a capacity of two hundred barrels per day.

One well, of the capacity of two hundred barrels per day on the south twenty-five feet from the line, is also located on the allotment of William G. Twist. One well of a daily capacity of twenty-five barrels per day, one hundred and fifty feet from the line, located on the allotment of Eliza J. Lloyd, leased to the Los Angeles-Cherokee Oil Company, which is still under departmental supervision.

Two wells of the capacity of one hundred and fifty barrels per day each, practically on the east line, situated on the allotment of Carrie M. Keys, leased to the Little Rock Oil Company; canceled by agreement January 6, 1909. These wells were brought in about two months ago.

Three wells, one hundred and fifty feet from the north line, of a capacity of two hundred barrels per day each, located on the allotment of Jennie Archilla, leased to the Alpine Oil Company, still under Departmental supervision.

Two wells, one hundred and fifty feet from the north line, of a daily capacity of two hundred barrels each, located on the allotment of Floyd B. Payne; no lease appears on record here.

Two wells, one hundred and fifty barrels capacity each, fifty feet from south line, on the allotment of Albert J. Lloyd, leased to Justin Oil Company, but said lease disapproved by lessor and lessee, on

November 27, 1908. These wells have produced up to the present time, approximately 337,050 barrels, five per cent. of which in my judgment has been taken from the property in question, amounting to 18,352.50 barrels; this at .41 per barrel will be $7,524.53. This shows the amount that the property has been damaged by drainage and in my judgment should the present conditions continue during the next six or eight months, the damage will at least be five thousand more, making a total of $12,524.53. The present monetary value of the entire property, from the best evidence obtainable, is thirty thousand dollars.

Figuring on a basis of four hundred barrels per day, the cash value of one-eighth royalty on this basis of settled production, which in my judgment, is certain, would be worth three hundred dollars per barrel, or fifteen thousand dollars.

In explanation of the way in which I arrive at these conclusions will state that I assume the property at a settled production of four hundred barrels per day. This has a market value of two hundred dollars per barrel, which would show the property, when in this condition, to have the value of eighty thousand dollars. From this deduct the expenses of drilling, about fifteen wells, which will be about fifty thousand dollars, leaving a balance of thirty thousand dollars for the property in its present condition.

87 I find the damage to the east thirty acres, towit, the N 2 of the N. W. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. E. 4, has not suffered proportionately by drainage as great an extent as the west 20 acres, and would consider that the east 30 acres has been damaged by drainage to the amount of about four thousand dollars, and the west 20 acres has been damaged to the extent of three thousand, five hundred, twenty-four dollars and fifty-three cents. As my information goes, the wells drilled on the land to the east are lighter than those to the west, but on account of the west 20 acres being more damaged by drainage, both portions of the property have about the same monetary value per acre. This shows the east 20 acres to be of the monetary value of $18,000.00, and the west 20 acres, $12,000.00, making a total of $30,000.00.

In the matter of the cash value of royalties on the west 30 acres, they would be $9,000.00 an acre; and on the west 20 acres, $6,000.00. This is figured on the basis of 240 barrels settled daily production on the east 20 acres, and 160 barrels settled daily production on the west 20 acres, respectively.

(Signed) ALEXANDER HAMILTON,
Oil Inspector.

Will you stipulate it can be considered the same as the original, the same as we did about the telegram, for the purpose of preserving the files of the Five Tribes office; that this letter be considered as the original?

Mr. SMITH: We move to strike the letter just read for the reason that it is not the best evidence, and for the further reason that Alexander Hamilton is in no way qualified to give opinions upon the various matters about which he has expressed an opinion, and be-

cause the statement does not come from anybody who has been sworn as a witness.

Mr. COOK: Will you stipulate that it will be considered the same as the original?

Mr. SMITH: Yes, I will stipulate that.

Mr. COOK: For the purpose of preserving the files of the Commissioner to the Five Civilized Tribes' office.

Q. Mr. Wright was Mr. Hamilton—you testified that Mr. Hamilton was an official Oil Inspector?

A. Yes sir.

Q. And part of his duties were to examine oil wells and to ascertain their production?

A. Yes sir.

Q. This letter that was just read into the record was it an official report of Mr. Hamilton to you, as his superior officer?

A. Yes sir.

Q. And as such is a part of the records of the Commissioner to the Five Civilized Tribes' office?

A. Yes sir.

Mr. SMITH: The objection is renewed that the witness has not shown to be qualified to testify—to make statements about that about which he is attempting to give an opinion.

Mr. SMITH: I desire to cross-examine the witness of the relator.

Mr. COOK: I object to the gentleman cross-examining his own witness; he may re-direct examine him.

88 Mr. SMITH:

Q. I will ask Mr. Wright, what was done by your office with the letter of Alexander Hamilton, of date April 17th, 1909, which has been read, as to whether it was transmitted to the Department.

A. It was forwarded to the Secretary at Washington, with the other papers, and the record in the case.

Q. Do you know when it was transmitted?

A. In April, I think.

Q. Sometime in April?

A. I think; 1909.

Q. How was it transmitted, by mail?

A. Yes sir.

Q. Do you happen to know of your own personal knowledge whether or not it was in the hands of the Assistant Acting Secretary of the Interior, Mr. Pierce, when he delivered the decision on this matter, May 10th, 1909?

A. I cannot say of my own personal knowledge that it was before the Department.

Q. But it was mailed in April?

A. It was sent up, yes sir; mailed with the record.

Q. It was with the record?

A. Yes sir.

Q. And the other papers in the case?

A. Yes sir.

By Mr. COOK:

Q. Mr. Wright, as a matter of personal knowledge, you do not know whether the Acting Secretary, Mr. Pierce, ever saw this report prior to May 10th, 1909?
A. No sir, I do not.

D. H. BYNUM, first being duly sworn, upon his oath testified as follows:

On direct examination.

By Mr. SMITH:

Q. What is your name?
A. D. H. Bynum; Chief Clerk to the Commissioner to the Five Civilized Tribes, Muskogee, Okla.
Q. Did you occupy that position on May 11th, 1909?
A. I did.
Q. You have been in the room since the beginning of taking testimony here today, while Mr. Wright testified?
A. I have.
Q. You heard the telegram read into the record?
A. I did.
Q. What did you do, if you had anything to do with that matter, after the receipt of the telegram?
A. To the best of my recollection, I directed one of the employees to proceed to Shiatook, the residence of the Cherokee Chief, to secure the execution of the two deeds for this land to Twist and Knight.
Q. Were those deeds prepared upon the usual and regular form of deeds or patents that were issued to Cherokee citizens?
A. They were.
Q. At the office of Commissioner to the Five Civilized Tribes, at Muskogee. Any other but the one for these deeds?
A. Not to that class of citizens.
Q. Were the deeds ever returned to you?
A. They were.
Q. Had they been executed?
A. They had.
Q. By whom?
A. By the Principal Chief of the Cherokee Nation.
89 Q. His name?
A. W. C. Rogers.
Q. Do you know, approximately, how many deeds have been issued to the Cherokee Indians?
A. As a rough estimate, I would say probably a hundred thousand.
Q. Has there in your knowledge been an instance of the issuance of a deed to a Cherokee Indian in the administration of the affairs of that office of Commissioner to the Five Civilized Tribes, of a deed under the special direction of the Secretary of the Interior, as this was issued—an other instance of that kind?
A. I have no recollection of a similar case.
Q. How long have you been with the Commission?

A. About four years and a half.

Q. Do you remember whether these deeds were transmitted by your office to the office of the Secretary of the Interior at Washington?

A. They were.

Q. Do you remember the date?

A. No, I do not.

Q. Do you remember whether or not your office, or the office of the Commissioner, telegraphed the Secretary of the Interior on May 13th, 1909, with reference to what had been done in the matter of carrying out the direction of the Secretary in his telegram of May 11th, which has been read into this record?

A. To my best recollection, there was such a telegram sent.

Q. Was that telegram confirmed by a letter of May 15th, if you remember?

A. To the best of my recollection, it was.

Q. Was the money paid which was mentioned in the telegram of May 11th, 1909?

A. Certified checks were delivered to me and after endorsement by Commissioner Wright, the endorsee, they were transmitted to the Department.

Q. At the same time the deeds were transmitted?

A. Yes.

Q. That, I believe, you said was on May 15th?

A. On or about that date.

Q. Do you remember the date when you received the certified checks?

A. Checks, aggregating $12,000.00, were filed—were delivered to the office several days in advance of two other checks, aggregating $13,000.00. The two checks aggregating $13,000.00 were turned over to me at Tulsa, I think the day of the telegram.

Q. The 13th?

A. To the Department, whatever that is.

Q. You may state your business in Tulsa that day.

A. To the best of my recollection, I went to Tulsa to expedite the execution of the orders of the Department, with reference to the preparation of deeds and the forwarding of the sum of $25,000.00.

Q. Then the four checks which you have mentioned aggregated the sum of $25,000.00?

A. They did.

Q. Now they were all in your hands on the day of the telegram and a couple of days before the letter—the telegram of the 13th and letter of the 15th?

A. They were. I wish to make a correction in the record.

Q. Yes sir.

A. My presence at Tulsa at that time was not with reference to these Twist-Waters or Knight-Waters cases, as I now remember, but to confer with the United States Attorney with reference to the prosecutions for timber depredations.

90 Q. You received the checks however, while you were in Tulsa?

A. Yes sir.

Q. You say they were certified checks—you mean they were certified by the bank?

A. Cashier's checks, as I remember.

Q. There was no objection by the Department that it was not in form of legal tender currency?

A. I cannot answer for the Department.

Q. There was none upon your part?

A. None upon my part.

Q. Never heard that question raised by anybody?

A. No sir.

Q. Mr. Bynum, permitting one of the parties to the contest in the contest department, to relinquish the application to file, is the same thing as withdrawing by confession of judgment, isn't it?

A. I should say the effect is the same.

Q. That is a common practice in the department is it not?

A. Yes.

On cross-examination.

By Mr. COOK:

Q. Mr. Bynum, you testified to having received certified checks for $25,000.00?

A. I did.

Q. Who were they received from?

A. Mr. Zevely delivered two checks for $12,000.00, one that I received from Tulsa was from a Mr. Anderson; the other from a Mr. White.

Q. What Anderson was that, do you remember?

A. I don't know his first name.

Q. H. P. Anderson?

A. H. P. Anderson.

Q. What was the amount of that check?

A. They were two checks, one for eight thousand and one for five thousand dollars; which one Mr. Anderson gave me, I don't know, but I think it was for the eight thousand, as it was for the thirty acres.

Q. What White did you receive the other check from?

A. I don't remember his initials.

Q. P. J. White or Thomas White?

A. I cannot say.

Q. Mr. Bynum, where are those certified checks for $25,000.00?

A. I think they are in the safe of the Disbursing Agent for the Commissioner to the Five Tribes.

Q. Have they been continuously in the custody of the Commission, since their receipt?

A. They have not.

Q. Where were they when they were not in the custody of the Commissioner?

A. They were transmitted to the Department; returned by the Department, with instructions to return them to the contestants, Twist and Knight, or their proper representatives, and accordingly

they were sent by mail to the firm of Zevely, Givens & Smith, as attorneys, and both shortly afterwards returned to the office, stating that such firm refused to receive them.

Q. Mr. Bynum, you testified in your direct-examination to having two deeds executed by the Cherokee Chief, to whom were those deeds made?

A. They were made to the contestants, Twist and Knight, respectively, for the lands involved in the contest proceeding.

Q. Mr. Bynum in your capacity of chief clerk to the Com-
91 - missioner to the Five Civilized Tribes, do you have anything to do with contest proceedings?

A. I do.

Q. Are you familiar with the procedure affecting contests?

A. I am.

Q. Mr. Bynum is it customary to relinquish and confess judgment in contest proceedings?

A. Relinquishments and confessions of judgment by minors are not allowed as frequently as in the case of adults, and they are more closely examined.

Q. Is it customary in your office, Mr. Bynum to permit legal guardians of minors to relinquish or confess judgment on behalf of the minors, without an order of the probate court having jurisdiction over those minors, or has that contingency ever arisen in your experience with the Five Tribes?

A. Yes, I recall, I think, one or two instances, and where one case the Commission denied I think the confession of judgment upon that ground,

Q. Because there wasn't an approval by the court?

A. Because there was no authority for the guardian to take that step.

Q. Do you know whether or not Charles Waters, the father and legal guardian of Eva Waters—father and guardian, ever made application to relinquish and confess judgment for this land?

A. He made two applications, to the best of my recollection.

Q. Did he have at either time an order from the court to permit him to take such steps?

A. I think not at the time the applications were made——

Q. Did Waters ever present an order of the court at any time before these application- to relinquish had been disposed of, by the Department?

A. No, I think not.

Mr. SMITH: The relators move to strike the last question and answer, for the reason that the question is immaterial and does not tend to prove any issue in the case, because Charles Waters *is* the natural guardian, as distinguished from the legal guardian, had under the law the right to relinquish or confess judgment.

By Mr. SMITH:

Q. Mr. Bynum the natural guardian as distinguished from the legal guardian was always permitted by the department to relinquish or confess judgment, was he not?

A. I should say so, yes.

Q. Mr. Bynum don't you know that Maudie Waters, the mother and natural guardian, made these relinquishments?
A. To the best of my recollection, she did.

By Mr. COOK:

Q. Did you know at the time Maudie Waters, the natural guardian of this ward, made this application to relinquish that there was a legal guardian for this child?
A. It was not so discovered until after the first application had been filed.
Q. What was that first application, if you remember, Mr. Bynum?
A. I think that was about a year ago.
Mr. PERRY: That wasn't one of these applications?
A. No.
92 Q. Did the legal guardian join in these subsequent applications?
A. To the best of my recollection, he did.
Q. Did they have an order of court?

Mr. SMITH: Object to that because it is immaterial. The Act of Congress of July 1st, 1902, commonly called the Cherokee Treaty, provides, sec. 70, as follows: Allotments may be selected and homesteads designated for minors by father or mother of citizens or by guardian or curator, or administrator having charge of their estate, in the order named.

Q. Answer the question, Mr. Bynum.
A. To the best of my recollection, he did not present such order of court.
Q. Mr. Bynum your department, the Department of the Commissioner, rather, holds that the person having the right to act in the matter of relinquishment and confession of judgment and about these allotments, is in the order named in this section I have read?
A. That has not been held to be a strict rule.

Mr. SMITH: The relators offer in evidence the following motion of contestee to confess judgment in contest case No. 4848, styled Herman Knight Contestant, vs. Eva Waters, a minor, contestee, involving the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4 of Section 19, Township 20 North, Range 13 East, containing 30 acres.

Motion of Contest to Confess Judgment.

Now comes the above named contestee, Eva Waters, a minor, by her father and legal guardian, C. W. Waters, and her mother, Maudie Waters, and makes this her motion to confess judgment, in favor of the contestant herein; and asks that she be allowed so to confess judgment, and that the land in controversy be allotted to the contestant, upon the following grounds, and for the following reasons: The contestee, through her mother, Maudie Waters, filed upon the land in controversy on the 27th day of August, 1907; said

land is described as follows: N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4 of Sec. 19, Township 20 North, Range 13 East, containing 30 acres, more or less. Thereafter, and on the blank date of blank, 190– the above named contestant, Herman Knight, lodged a contest against this contestee in the office of the Commissioner to the Five Civilized Tribes, seeking to obtain the above described land in allotment and the said contest ever since has been and now is pending. The contestee is entitled to an allotment, if at all, under the act of April 26, 1906, and not otherwise. And the right of this contestee to enrollment or to an allotment of the lands of the Cherokee Nation has never been finally decided, and it is still a matter of doubt as to whether she will receive an allotment. The contestant, Herman Knight, is an adult citizen of the Cherokee Nation on the regular rolls thereof. Since the institution of the said contest, the said land has become by
93 reason of prospecting for and development of lands in the vicinity for oil, very valuable for oil purposes. The lands immediately adjacent to this land on all sides have been developed for oil and there are now on all of the lines of this land producing oil wells as are shown on the map attached and marked Exhibit "1." That some of said wells have been producing for at least six months, and have drained the land during all of that time. And the wells at present producing are being shot and are rapidly draining the land in contest of all oil located underneath the same. That if the land is so drained much longer it will lose practically all of its value for oil and gas, and that said value is all which the land possesses. The guardian of said contestee has arranged with the contestant a compromise of this contest by the terms of which the contestant is to be allowed to file on the land and the contestee is to withdraw his contest. In consideration the contestee to receive the sum of $7200.00, which is to be deposited in escrow as the Commissioner directs, payable when patents have issued to the said contestant. The guardian of the said contestee has made diligent enquiry and investigation and from all of the information which he has obtained is of the opinion that it would be very much to the interest of the contestee that said compromise shall be made, so that the value of said oil under the land may be saved, and at the same time the contestee receive for the same a fair compensation.

Wherefore, the contestee by her guardian as aforesaid, prays the Commissioner that the contestee be allowed to confess judgment, and withdraw her filing from the land in contest, and be allowed to file elsewhere.

(Signed) C. W. WATERS,
Guardian of Eva Waters, Minor.
MAUDIE WATERS,
Mother of Eva Waters.

STATE OF OKLAHOMA,
County of Muskogee, ss:

C. W. Waters, being first duly sworn, deposes and says that he is the legal guardian of Eva Waters a minor, the contestee in the above

named contest; that he has read the above motion for confession of judgment, and understands the same, and that the same is true.

(Signed) C. W. WATERS.

Subscribed and sworn to before me this 6th day of April, 1909.

WALTER W. CHAPPELL,
Notary Public.

With notarial seal of Muskogee County, Oklahoma.
My commission expires January 13, 1910.

Mr. SMITH: It is agreed that——

Mr. COOK: It is hereby stipulated and agreed between counsel that the above motion of contestee to confess judgment is a true
94 copy of the original on file in the office of the Commissioner to the Five Civilized Tribes, and shall be so considered in this proceeding.

Mr. SMITH: Shall be taken with like force and effect as the original.

Mr. SMITH:

Q. Mr. Bynum were the deeds to Knight and Twist, respectively, which you have mentioned as having been executed by the Chief of the Cherokee Nation, descriptive of the lands as to which contestant conveyed—that is in each case the lands they are contesting for—did you compare these deeds with the record to see that they were correct in that respect?

A. They were compared and were correct.

Mr. SMITH: The relators offer in evidence the decision in the case No. 4922, William J. Twist vs. Eva Waters, and 4848, Herman Knight vs. Eva Waters, of the first Ass't Secretary of the Interior of date June 24, 1909.

To the Commissioner of Indian Affairs:

SIR: This is a motion filed June 9, 1909, on behalf of Eva Waters, contestee in the above entitled cause, seeking the review of the Departmental decision of May 10, 1909, permitting her to withdraw from said contest by a confession of judgment, and awarding the land in controversy to the contestants, according to the respective tracts claimed by each. The evidence adduced in support of the motion shows that the consideration for said withdrawal, receivable by her with the Department's sanction, under its said order of May 10, 1909, is not at all commensurate with the extent of her potential in the land in controversy. The case is analogous to those judicial sales which the court upon proper application within seasonable time will set aside on account of inadequacy of consideration.

It is further quite patent that the increasing valuation renders any present appraisement hazardous. Moved by these considerations and that the interest of the minor contestee may in no way be impaired by previous departmental action, the decision of May 10, 1909, is hereby vacated. The contest cases will therefore be con-

sidered and disposed of on their merits. The case of Twist vs. Waters is now ready for determination, but in view of this action, and certain matters brought into the case in support of the motion, the parties in interest should have a reasonable time within which to submit further argument in said contest case, if they desire. You will kindly notify the attorneys of record in said contest in person or by registered mail that they will be allowed ten days from receipt of notice in which to submit such further arguments or matters under said contest as they desire. The case of Knight vs. Waters will be the subject of a separate communication.

Very respectfully,

(Signed) FRANK PIERCE,
First Assistant Secretary.

95 Mr. COOK: It is agreed by and between counsel for the parties hereto that the separate order referred to in the decision which is just read into the record, shall, if received by the Commissioner to the Five Civilized Tribes prior to the time the notes taken in this proceeding are transcribed, that the same shall be, by the Chief clerk of the Commissioner to the Five Civilized Tribes, dictated into this record, and shall be considered as a part of this proceeding.

Mr. SMITH: And it is stipulated that the decision of June 24th, just read into the record, may be read in evidence and taken with like force and effect as the original on file with the Commissioner of which the above is a true copy.

It is further stipulated that the confession of judgment by Charles Waters, and Eva Waters, in the Twist case, is identical with the confession of judgment in the Knight case just read, except as to consideration heretofore read into the record, and may be taken by the court.

Mr. BYNUM (Reading into record order, as per stipulation on page 30):

JUNE 30, 1909.

Commissioner of Indian Affairs.

SIR: Referring to my decision of June 24th, 1909, relating to the Cherokee allotment contests of Twist vs. Waters and Knight vs. Waters, you are requested to inform the Commissioner to the Five Civilized Tribes that the Department desires him to proceed at once to hear and adjudicate the latter case and to make his action thereon special.

To insure expedition on the part of all concerned, it is also directed that no dilatory tactics whatever be permitted, and that all unnecessary delays be avoided in all offices of the department as to this case. The papers in the Knight-Waters case are herewith.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.
DIXON H. BYNUM.

JAMES M. GIVENS, first having been duly sworn, upon his oath deposes and says:

On direct examination.

By Mr. SMITH:

Q. State your name, age, and residence.
A. James M. Givens; 40 years old; Muskogee, Oklahoma.
Q. Occupation?
A. Attorney at Law.
Q. Mr. Givens, were you present on the 24th day of June, 1909, when Assistant Secretary of the Interior, Pierce, vacated his order of June 10th, 1909,—May 10th, 1909, in the Twist-Waters cases?
A. I was; I think the date was June 24th, 1909.
Q. State who was present on that occasion.
A. As I remember there were present, beside Acting Secretary of the Interior, Judge Pollock, an assistant to the Assistant At-
96 torney General of the Department of the Interior, Messrs. Serven and Mohun, of the firm of McGowan, Serven & Mohun, Mr. W. A. Scofield, an attorney of Westville, Oklahoma, Mr. E. R. Perry, of Tulsa, Oklahoma, and myself. In addition I remember that there was a stenographer present, who took down in shorthand, the opinion of the Acting Assistant Secretary of the Interior. There may have been other persons present, but I remember distinctly that those persons whom I have mentioned were present.
Q. At that time, did the Ass't Secretary of the Interior or Acting Secretary of the Interior Pierce, say anything about having been misled by anybody in connection with his action of May 10th, in the Twist-Waters and Knight-Waters cases?

Mr. COOK: I object to the question in that form. It is leading.
A. He did not.

Cross-examination.

By Mr. COOK:

Q. Mr. Givens, did you file an answer to the motion to review the decision of the Secretary and also a motion to dismiss the confession of judgment in the Knight vs. Waters case?
A. We did.
Q. Did you also file one in the Twist-Waters contest?
A. We did.

JAMES M. GIVENS.

Filed September 4, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

At Law. No. 51809.

WILLIAM J. TWIST, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Be it known, that — an examination of witnesses begun and held on the 24th and 25th days of August, A. D. 1909, when the depositions hereto attached were taken, I Guy L. Reed, a Notary Public in and for the State and County aforesaid, did cause to be personally present before me at the office of R. W. Kellough, at Tulsa, Oklahoma, the following named witnesses, viz: —— ——, ——
97 ——, to testify on the part and behalf of the relator in a certain cause now pending in the Supreme Court of the District of Columbia wherein the United States of America, on the relation of Herman Knight and William J. Twist, respectively, is relator, and Richard A. Ballinger, Secretary of the Interior, is respondent; it being agreed by and between the parties that the testimony here taken shall apply to both causes Nos. 51808 and 51809; that the testimony shall be reported and transcribed by Giles A. Penick, instead of by the Notary Public; and that witnesses subpœnaed for the 25th of August may be examined on the 24th.

Present on behalf of the relator, Messrs. Zevely, Givens & Smith and Mr. E. R. Perry, and on behalf of the respondent, Mr. J. Carter Cook.

The witnesses above named, being of lawful age, were by me sworn before any question was put to them, to tell the truth, the whole truth, and nothing but the truth, relative to said cause, and thereupon the said witnesses deposed and said as follows:

JOHN ROY, being first duly sworn, upon his oath deposes and states as follows:

Direct examination.

By Mr. ZEVELY:

Q. State your name, please, and your occupation, and your age and residence.
A. John Roy, Tulsa, 47 years old; oil producer.
Q. How long have you been in the business of producing oil, Mr. Roy?
A. Over thirty years.
Q. Where have your employments been?
A. Pennsylvania, Ohio, West Virginia, and Oklahoma.
Q. How long have you been in Oklahoma?
A. Two years.
Q. In what branches of the oil producing business have you been engaged?
A. I have been in the producing business entirely.
Q. Just state in detail what you mean.
A. As superintendent and owner.
Q. Owner of leases?
A. Yes sir, and wells.
Q. Purchaser of leases?
A. Yes sir.
Q. Buying and selling leases?
A. Yes sir.
Q. And drilling of property?
A. Yes sir.
Q. You have been sitting here and heard most of this testimony, haven't you, Mr. Roy?
A. Yes sir.
Q. And heard the description of this land here?
A. Yes sir.
Q. Are you familiar with the land?
A. I have been on the land twice, and driven past it a good many times.
Q. When were you on the land more recently?
A. On the land last, last Saturday.
Q. Last Saturday?
A. Yes sir.
Q. Did you make any investigation then of the wells drilled on the land immediately adjacent to this fifty acres?
A. I didn't make an investigation; I enquired and tried to inform myself.
Q. Know how many there are?
A. If I remember right, eighteen or twenty wells.
Q. Do you know approximately what these wells are pro-
98 ducing now?
A. Only from what enquiries I made; I judge these wells from sixty to a hundred barrel wells.

Mr. COOK: On behalf of respondent, ask that the answer of this

witness as to the production be stricken out as he testifies not on his own knowledge.

A. On the south side of that property I understand is light. There is only one well, I understand; the southwest corner is a light well.

Q. Mr. Roy, from your long experience in the oil business and from your knowledge of this property and the lands, the developed lands, which surround it, what would you say is its market value today, the fee title, free from incumbrance of lease, or any other incumbrance?

A. Well I should say three hundred dollars an acre would be a good price for it.

Q. Three hundred dollars an acre?

A. Yes sir.

Q. Mr. Roy, from your experience as an oil man and your knowledge of this locality, the situation of this land in controversy, what in your opinion would have been a fair bonus to have paid for a lease on this land an oil and gas mining lease on this land, in April 1909, considering that the royalty was twelve and a half per cent, and that the lease was a regular government form lease?

A. Well, I should say no more than two hundred dollars an acre.

Q. Not more than two hundred dollars an acre?

A. Yes sir.

Cross-examination.

By Mr. COOK:

Q. Mr. Roy, — you a member of any oil companies?

A. Yes sir.

Q. What are those companies?

A. The Vernon Oil Company.

Q. Are you interested either directly or indirectly in any companies owning leases contiguous to this fifty acres?

A. No sir.

Q. You give it as your opinion, Mr. Roy, that two hundred dollars an acre is a fair valuation for this property, bonus for this property, is it given—is that estimate based as being offered by a prospective purchaser, who wanted to get into the oil business, or one that is overloaded in the oil business?

Mr. ZEVELY: The same objection, Mr. Stenographer.

A. I didn't understand that question.

Q. That two hundred dollars bonus — a fair valuation from a man anxious to get in the oil business, or one overloaded?

A. I think it a very fair valuation for anybody; it might be an error in judgment, of course, but the question that was asked was what I would give for a lease bearing a royalty of twelve and half per cent in April.

Q. That estimate based upon personal investigation or from information given you by others?

A. Well, generally from information given me by others. I never worked on the property.
Q. Have you been in Tulsa all this summer?
A. Yes sir.
Q. Since spring?
A. Yes sir.

JOHN ROY.

99 *Motion to Dismiss.*

Filed October 6, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now the respondent in the above-entitled action and moves the court to dismiss the petition heretofore filed in said cause for the following reasons:

1. Because, by reason of those matters set forth in respondent's supplementary answer filed, according to the requirements of law and rules of practice, in said action, on September 1, 1909, to wit, that title to the land in controversy has already passed to other parties, and is beyond the jurisdiction of your respondent to control, the subject matter of relator's complaint and the issues presented by the pleadings herein, present purely a moot question.

2. Because the relator has failed diligently to prosecute this action in that to the matters aforesaid, set forth in respondent's supplementary answer aforesaid, said relator has neither joined issue by replication nor has demurred thereto, nor has in any respect answered the exigencies of said supplementary answer.

OSCAR LAWLER,
Assistant Attorney-General;
F. W. CLEMENTS,
First Assistant Attorney;
C. EDW. WRIGHT,
Assistant Attorney,
Att'ys for Respondent.

To Brandenberg & Brandenberg, Attorneys for Relator.

SIR: Please take notice that the foregoing motion will be set down for hearing before Mr. Chief Justice Clabaugh on Friday, the 8 day

of October, 1909, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard.

OSCAR LAWLER,
F. W. CLEMENTS,
C. EDW. WRIGHT,
Attorneys for the Respondent.

Service of copy of the foregoing motion and notice accepted this 5 day of October, 1909.

BRANDENBURG & BRANDENBURG,
Per O., *Attorneys for Relator.*

100 *Motion to Strike Supplemental Answer and Notice of Hearing.*

Filed October 13, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

Mandamus.

Comes now the petitioner herein, the United States of America on the relation of Herman Knight, by its attorneys and moves the Court to strike from the files of this case, the so-called supplemental answer filed herein by the defendant on the 1st day of September, A. D., 1909.

And for cause therefore says:

First. For that the said so-called supplemental answer was filed without leave of Court first had and obtained, after issue had been joined in this cause and testimony taken thereon.

Second. For that by the said so-called supplemental answer, an entirely different issue was raised from that set up in the pleadings upon which issue had been joined and testimony taken.

Third. For that the said so-called supplemental answer presents propositions inconsistent with each other.

ZEVELY, GIVENS & SMITH,
BRANDENBURG & BRANDENBURG,
Attorneys for Relator.

Oscar Lawler, Esq., Attorney for Defendant.

DEAR SIR: Please take notice that we shall call the foregoing motion to the attention of Mr. Chief Justice Claubaugh, holding Circuit

Court No. 2, at the hour of 10 o'clock A. M., on the 14th day of October, A. D., 1909.

ZEVELY, GIVENS & SMITH,
BRANDENBURG & BRANDENBURG,
Attorneys for Relator.

101 Supreme Court of the District of Columbia.

THURSDAY, *October* 14*th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

No. 51808. At Law.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Pl'ff,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior, Def't.

This cause coming on to be heard, Mr. Edwin C. Brandenburg, attorney for plaintiff, moves that Messrs. J. W. Zevely and Edgar Smith of Oklahoma, may be heard on behalf of plaintiff for the purposes of this case, which is by the Court granted.

Whereupon, the motion of petitioner filed herein by his attorneys, October 13th, 1909, to strike from the files "the so-called supplemental answer," filed herein September 1st 1909, coming on for hearing the respondent by his attorneys moves for leave to file said answer on September 1st, 1909, nunc pro tunc, which is hereby granted, and so ordered.

Thereupon, the petitioner, by his attorneys in open Court, withdraws the aforesaid motion filed October 13th, 1909, and moves for leave to demur to said supplemental answer forthwith, which is hereby granted, and thereupon said demurrer is filed.

Further, the respondent by his attorneys in open court withdraws his motion filed herein October 6th, 1909, to dismiss the petition herein.

Whereupon, attorneys for the respective parties after argument of this cause upon the demurrer to said supplemental answer, submit the same to the Court for consideration, whereupon it is ordered that said demurrer be, and the same is hereby overruled, with leave to petitioner to plead over as advised within ten days hereof.

Demurrer to Supplemental Answer.

Filed October 14, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Department of Interior.

Mandamus.

Comes now the relator by his attorneys and demurs to the so-called supplemental answer of the respondent, filed Septem-
102 ber 1, 1909, to the amended petition in the above entitled cause, and says that the same is bad in substance.

ZEVELY, GIVENS & SMITH,
BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

NOTE.—Among the points of law to be argued in support of the foregoing demurrer are the following:

1. That the so-called supplemental answer raises an entirely different issue from that set up in the pleadings on which issue had been joined and testimony taken.

2. That the said so-called supplemental answer presents propositions inconsistent with each other.

3. That the facts set up in the so-called supplemental answer that a deed has been issued and delivered to a third party for the property involved in this case, since the joinder of issue herein, operates to relieve respondent from any further duty in reference thereto and that therefore the question involved in the petition is a moot one and also a sufficient defense to the relief claimed, does not in law constitute a good defense.

Replication to Supplemental Answer.

Filed October 25, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Department of Interior.

Mandamus.

Comes now the relator Herman Knight, by his attorneys and without waiving his rights under the demurrer heretofore filed, for

replication traverses and denies each and every of the allegations of the so-called supplemental answer filed herein on the 1st day of September, A. D., 1909.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH,
Attorneys for Petitioner.

103 *Joinder of Issue.*

Filed October 28, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now the respondent in the above-entitled cause, by his attorneys, and joins issue upon the relator's replication to respondent's supplementary answer to the rule to show cause.

OSCAR LAWLER,
Assistant Attorney General.
F. W. CLEMENTS, *First Assistant Attorney.*
C. E. WRIGHT, *Assistant Attorney.*
BRANDENBURG & BRANDENBURG,
Attorneys for Respondent.

Motion to Set Cause for Hearing.

Filed November 26, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now the petitioner in the above entitled action and moves the Court to set a day for the hearing of said cause.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH,
Attorneys for Petitioner.

Oscar Lawler, F. W. Clements, C. N. Wright, Attorneys for Defendant:

Please take notice that on Friday morning, December 3rd, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can
104 be heard, we shall call the above motion to the attention of Mr. Chief Justice Wright, holding Circuit Court No. 1.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH,
Attorneys for Petitioner.

Copy of Patent.

Filed December 13, 1909.

Allotment Deed 35087A. Cherokee New Born Roll No. 325.

The Cherokee Nation (Formerly Indian Territory), Oklahoma.

To all to whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it is provided that there shall be allotted by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Tribe, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, and,

Whereas, It was provided by said Act of Congress that each citizen shall designate or have designated and selected for him, at the time of his selection of allotment, out of his allotment, as a homestead, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, for which he shall receive a separate certificate, and,

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Eva Waters, a citizen of said tribe, as an allotment, exclusive of land equal in value to forty acres of the average allottable lands of the Cherokee Nation, selected as a homestead as aforesaid,

Now, therefore, I, the undersigned, Principal Chief of the Cherokee Nation, by virtue of the power and authority vested in me by aforesaid Act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said Eva Waters all right, title and interest of the Cherokee Nation, and of all other citizens of said Nation, in and to the following described land, viz: The South West Quarter of the North West Quarter of the South East Quarter of Section Seventeen (17), Township Twenty-seven (27) North and Range Sixteen (16) East, and the East Twenty (20) Acres of Lot Two (2) and the West Half of the South East Quarter of the North West Quarter and the North East Quarter of the South East Quarter of the North West Quarter of Section Nineteen (19), Township Twenty (20) North and Range

Thirteen (13) East, and the North Half of the North East Quarter of the South East Quarter of Section Twenty-three (23), Township Nineteen (19) North and Range Twenty-five (25) East of the Indian Base and Meridian, in Oklahoma, containing Eighty (80) acres, more or less, as the case may be, according to the
105 United States survey thereof, subject, however, to all the provisions of said Act of Congress.

In witness whereof, I, the Principal Chief of the Cherokee Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this day of Aug. 21, A. D. 1909.

W. C. ROGERS,
Principal Chief of the Cherokee Nation.

DEPARTMENT OF THE INTERIOR.

Approved Aug. 25, 1909.
RICHARD A. BALLINGER, *Secretary.* [SEAL.]
By OLIVER A. PHELPS, *Clerk.*

Filed for record on the 27 day of Aug. 1909, at 4 o'clock P. M.

(Endorsed.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having custody of the record of Deeds of The Cherokee Nation and that the above and foregoing is a true and correct Copy of the Allotment to Eva Waters as the same appears of record in Book 77, page 36 of Allotment Deed Record.

In testimony whereof witness my hand this 3 day of Sep., 1909.

DIXON H. BYNUM,
Chief Clerk, in Charge.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the reverse side hereof is a true and correct copy of the receipt evidencing the delivery of deeds to the allotment of Eva Waters, a minor citizen of the Cherokee Nation enrolled under the Act of April 26, 1906, opposite number 325 on the roll of such citizens.

DIXON H. BYNUM,
Chief Clerk, in Charge.

Muskogee, Oklahoma, September 3, 1909.

(Endorsed.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
MUSKOGEE, OKLA., *Aug.* 27, 1909.

Received of the Commissioner to the Five Civilized Tribes
106 the following Deeds issued to Eva Waters Cherokee New Born Roll No. 325, and recorded in the office of said Commissioner:
Homestead No. 35087A.
Allotment No. 35087A.
(Signed) C. W. WATERS, *Guardian.*

Post Office, Westville, Okla.

Witnesses to mark:
——— ———.
——— ———.

Supreme Court of the District of Columbia.

MONDAY, *December 13th,* 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 51808. At Law.

UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

This cause coming on to be heard upon the pleadings the relator offered to read in evidence, the depositions heretofore taken and filed in this cause which were thereupon identified by the Clerk and marked "F. C. O'C., Dec. 13", 1909," but the Court declined to admit said depositions to be read in evidence, to which ruling exception was noted; whereupon the respondent offered in evidence a patent to the land in controversy issued as set forth in the supplemental answer of the respondent herein filed, to which objection was made by the relator and overruled, and the same was thereupon admitted in evidence, to which ruling the relator then and there noted an exception; that thereupon after due consideration by the Court, it is this 13th day of December, 1909, adjudged and ordered that the rule to show cause heretofore issued herein be discharged, that the prayers of the original and amended petitions herein filed be and the same are hereby denied, and that the original and amended petitions be and the same are hereby dismissed, with costs, against said relator, for which execution shall issue. Appeal noted in open Court and bond for costs fixed at One Hundred Dollars.

107 *Memorandum.*

January 3, 1910.—$100 deposited in lieu of bond on appeal.

Supreme Court of the District of Columbia.

No.	Parties.	Action.	Plaintiff's attorney-.
51808.	The United States of America *ex relatione* Herman Knight. *vs.* Richard A. Ballinger, Secretary of the Department of the Interior.	Mandamus.	Zevely, Givens & Smith, Brandenburg & Brandenburg. Defendant's attorney. Oscar Lawler.

Date.	Proceedings.
1909, July 16.	Deposit toward cost by Zevely.
" " "	Appearance, order; Petition, Aff't & Exhibits A, B, & C, filed.
" " "	Respondent required to show cause why writ should not issue by 23" inst. (M. 52, p. 342).
" " "	Rule to show cause (2) & copy petition issued.
" " "	Rule to show cause (2) & copy petition served.
1909, July 19.	Appearance Lawler for Def't.—Mo. to dismiss & notice filed.
" " 23.	Answer to rule "
" " "	Leave to file amended petition (M. 52, p. 347).
" " "	Amended petition & Aff't "
" " "	Stipulation that answer be deemed answer to amended Petition & appearance Brandenburg for Relator "
" " "	Stipulation making exhibits to original petition part of amended petition "
" " 28.	Replication "
" " 30.	Joinder in Issue "
" " "	Notice of trial "
" Aug. 3.	Hearing set for Sept. 2/09 (M. 52, p. 354).
" " 16.	Notices (2) to take depositions "
" " 19.	" (2) " " testimony "
" " 19.	" (2) " produce "
" Sept. 1.	Supplemental Answer "
" " 2.	Depositions before Guy L. Reed, Okla., "
" " "	" " Chester A. Cowper "
" " "	" of John Roy "
" Oct. 6.	Mo. to dismiss & Notice "
" " 13.	" " strike out Supplemental Answer & notice "

108

1909, Oct. 14.	Leave granted to file supplemental answer (Sept. 1, '09) nunc pro tunc. Mo. of Oct. 13, '09, withdrawn & leave granted to demur to sup. answer forthwith (M. 52, p. 383).

" " " Demurrer filed.
" " " Mo. of Oct. 6, '09, withdrawn. Demurrer to sup. answer overruled with leave to plead in 10 days (M. 52, p. 383).
1909, Oct. 25. Replication to Answer filed.
" " 28. Joinder in issue "
" Nov. 26. Mo. to set case for trial & notice "
" Dec. 13. Copy of Patent "
" " " Rule to show cause discharged & Petitions dismissed at Relator's costs; appeal noted—bond $100 (M. 52, p. 469).
1910, Jan'y 3. Deposit $100 by Brandenburg in lieu of appeal bond.
" " " Depositions of Jno. Roy & of Sep. 2, '09, published by Clerk.
" " 22. Designation of record filed.
" Feb'y 3. Time to file record extended to M'ch 15, '10, inc. (M. 54, p. 44).

Directions to Clerk for Preparation of Transcript of Record.

Filed January 22, 1910.

In the Supreme Court of the District of Columbia, the 22 Day of January, 1910.

At Law. No. 51808.

U. S. ex Rel. KNIGHT
vs.
BALLINGER.

The Clerk of said Court will please prepare record on appeal:
Petition, affidavits, & Ex.
Rule to show cause.
Motion to dismiss.
Answer.
Amended pet. & aff't.
Stip. as to answer.
" " " exhibits.
Replication.
Joinder of Issue.
Notice of trial.
Order Aug. 3, setting case for hearing.
Supp'l Answer.
All depositions.
109 Mo. to dismiss.
" " strike.
Leave to file Sup. Answer.
Mo. withdrawn.

Demurrer.
Mo. withdrawn.
Order overruling Demurrer.
Rep. to Answer.
Joinder in issue.
Mo. to set case for trial.
Copy patent.
Rule discharged & pet. dismissed.
Bond.
Docket entries.

BRANDENBURG & BRANDENBURG,
Att'ys for Pl't'ff.

OSCAR LAWLER,
Ass't Att'y Gen.,
By C. E. WRIGHT.

Memorandum.

February 3, 1910.—Time in which to file Transcript of Record extended from time to time to and including April 1, 1910.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 216, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51808 at Law, wherein the United States of America on the relation of Herman Knight is Plaintiff and Richard A. Ballinger, Secretary of the Department of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of March, A. D. 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2138. The United States of America on the relation of Herman Knight, appellant, vs. Richard A. Ballinger, Secretary of the Department of the Interior. Court of Appeals, District of Columbia. Filed Mar. 18, 1910. Henry W. Hodges, clerk.

110 Court of Appeals, District of Columbia, April Term, 1910.

No. 2138.

No. 15, Special Calendar.

THE UNITED STATES OF AMERICA on the Relation of HERMANN KNIGHT, Appellant,
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

Motion to Dismiss or Affirm.

Now comes here the appellee, by his attorneys, and moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Court below, upon the following grounds:

1. Because it appears from the record that a patent has issued to the land in controversy to a person other than appellant, and appellee cannot be compelled to issue another patent to the same land. Wherefore the case presents but a moot question.

2. Because appellant has no further interest in the subject matter of this case, having abandoned his allotment of the lands in controversy and secured the allotment to himself of other lands in their place and stead, as shown by the exhibits attached to this motion.

3. Because there is no bill of exceptions in the record herein and therefore no question properly presented to this Court for review.

4. Because appellant has failed to file herein fifteen copies of a printed brief at least five days before the case is liable to be called for argument as required by Section 3 Rule No. VIII of this Court.

5. Because it is manifest that the appeal was taken for delay only.

111

OSCAR LAWLER,
Assistant Attorney-General;
F. W. CLEMENTS,
First Assistant Attorney;
C. E. WRIGHT,
Attorneys for Appellee.

(Endorsed:) No. 2138. U. S. ex rel. Herman Knight, Appellant, vs. Richard A. Ballinger, &c. Motion to Dismiss or Affirm. Court of Appeals, District of Columbia. Filed May 2, 1910. Henry W. Hodges, Clerk.

112 No. 2138.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Appellant,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior.

WEDNESDAY, *May 4th, A. D.* 1910.

The motion to dismiss or affirm in the above entitled cause was submitted to the consideration of the Court by Mr. Oscar Lawler, of counsel for the appellee in support of motion and by Mr. E. C. Brandenburg in opposition thereto.

The argument in the above entitled cause was commenced by Mr. E. C. Brandenburg, attorney for the appellant, and was continued by Mr. Oscar Lawler, attorney for the appellee, and was concluded by Mr. E. C. Brandenburg, attorney for the appellant. On motion the appellee is allowed five days to file reply brief herein, if so advised.

113 No. 2138.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Appellant,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior.

Opinion.

(Mr. Justice ANDERSON, of the Supreme Court of the District of Columbia, who sat with the court in the hearing of this cause in the place of Mr. Chief Justice Shepard, delivered the opinion of the Court:)

The appellant, Herman Knight, a citizen of the Cherokee Nation, in Oklahoma, whose enrolment had been approved by the Secretary of the Interior, and who was entitled to an allotment under the act of Congress approved July 1, 1902, "An act to provide for the allotment of the lands of the Cherokee Nation, for disposition of town sites therein, and for other purposes" (32 Stat. at L., 716 et seq.), on July 16, 1909, filed his petition in the Supreme Court of the District of Columbia against Richard A. Ballinger, Secretary of the Interior, praying a writ of mandamus to compel him to deliver to appellant a patent or deed for thirty acres of valuable oil land of said Cherokee Nation which had been executed to him by the chief of the Cherokee Nation in pursuance of an order of the Secretary of the Interior, but which the Secretary thereafter refused, and still refuses, to deliver to appellant. The cause is here on appeal from an order of the court below denying said writ and dismissing said petition.

The petition alleges that on the 28th day of August, 1907, appellant made application to the Commissioner of the Five Civilized

Tribes at the Cherokee Land Office to take this particular allotment, to wit, the N. ½ of the S. E. ¼ of the N. W. ¼ and the S. W. ¼ of the S. E. ¼ of the N. W. ¼ of section 19, township 20 north, range 13 east, in said Cherokee Nation; that, it appearing of record in said office that theretofore, on August 21, 1907, said land had been selected by one Maudie Waters, as a tentative allotment for her minor child, Eva Waters, appellant thereupon filed a contest against said tentative selection; that the various proceedings thereafter had touching said contest culminated in a decision by the Secretary on May 10, 1909, awarding said land to appellant on condition that a certain sum of money be paid over to the Secretary as trustee for the benefit of said Eva Waters, such payment to be completed on or before May 15, 1909; that on May 11, 1909, the Secretary telegraphed the Commissioner of the Five Civilized Tribes that "lands in Twist and Knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty-five thousand dollars for use of minor Waters, contestants given including fifteenth to make payment," and instructed the Commissioner therein to "forward entire twenty-five thousand to department endorsed to Secretary when entire fund received by you" and "Prepare deeds to respective contestants and have them executed and forwarded here for approval;" that thereafter the Commissioner advised the Secretary of the due compliance of appellant with the terms of said telegram so far as his case was concerned (the Twist case not being here involved), and forwarded to the Secretary a deed properly executed by the chief of the Cherokee Nation conveying to appellant the said tract of land; and that "Said deed has been approved by the Secretary" and appellant "complied with all of the requirements imposed upon him by law," but that the Secretary has refused, and still refuses, to deliver the deed and "has ordered other and further proceedings in the Department of the Interior relating to this subject-matter," which appellant claims is in excess of the Secretary's jurisdiction, although he admits in his petition that under the rules of practice obtaining in the Department of the Interior in Indian affairs thirty days are allowed from and after notice of a decision within which to file a motion for rehearing or review, a copy of said rules being annexed to his petition as "Exhibit B" and made a part thereof.

The court below issued an order to show cause, and the Secretary appeared and answered. The answer denies that said proceedings of May 10, 1909, or any proceedings then or at any other time had culminated in a decision awarding said land to appellant, and also denies that the merits of the contest, i. e., whether the appel-
114 lant (contestant) or Eva Waters (contestee) had the greater right to the allotment of the land in controversy, were considered in making said proposed disposition of the case on May 10, 1909, or that such disposition was a final determination thereof, but that, it being then represented to him that the said Eva Waters, through her guardian, desired to withdraw from said contest in view of the large sum of money offered for such withdrawal and upon the further representation of appellant's counsel that the consideration was amply commensurate with the extent of her potential interest

in said land, and that moved by such considerations, he then deemed it to be for the best interests of said Indian ward, Eva Waters, to allow such withdrawal. The answer further avers that immediately thereafter the Secretary was advised by telegram from the parent and guardian of said Eva Waters that said ward protested against the allowance of said withdrawal, on the ground that the same had been induced by gross misrepresentation of the value of the land in controversy; that a motion to review said decision was thereupon presented, in due course by said Eva Waters, through her attorneys, and said motion was heard by the Secretary upon its merits, the appellant appearing at, and participating in, said hearing, through his counsel, and making no objection to the authority or jurisdiction of the Secretary in that behalf; that thereafter on June 24, 1909, the Secretary, being satisfied that the consideration offered for said withdrawal was inadequate, and that he had been misled in adjudging what the best interests of said Indian ward required, vacated the order of May 10, 1909, and thereupon directed that said contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, and that the money deposited on behalf of appellant should be returned to the party depositing it. The answer also avers that the contest case was thereafter duly proceeded with before said Commissioner of the Five Civilized Tribes, but had not yet reached the Secretary for consideration in the due course prescribed by the rules of practice in such cases obtaining, and further that no certificate of allotment had ever been issued to the appellant as a step preliminary to the issuance of a deed or patent, and, in addition thereto, the Secretary had refused to approve the deed here in controversy until the appellant should show himself, by a trial of the contest case instituted by him, to be entitled to said land in allotment.

On July 28, 1909, appellant filed a replication admitting that the question as to whether he or Eva Waters had the greater right to the allotment in controversy was not decided on its merits, but denying that he had misled the Secretary in adjudging as to the best interest of said Indian ward, and averring, on the contrary, that the Secretary was moved to the action taken by him solely and entirely by investigations conducted upon his own account; and further averring that the consideration of $15,000 to be paid by appellant, as named in the decision of the Secretary, was entirely adequate and for the best interests of the minor contestee, Eva Waters. The replication also averred that the decision of May 10, 1909, authorized appellant to proceed with the development of the land upon the payment of the consideration named therein, and that on May 13, 1909, appellant complied with said condition and immediately erected on said land derricks and other machinery necessary to the drilling for oil and natural gas.

On July 30, 1909, issue was joined on this replication and a number of depositions were taken by the appellant concerning the value of the land in controversy and the expenditures made by appellant, and also as to what Assistant Secretary Pierce did and said about the

case while it was pending before him. The appellee took no testimony.

On September 1, 1909, the appellee filed an additional pleading termed "Supplemental Answer," setting up that theretofore, on the 19th day of July, 1909, the matter of the contest then pending before the Commissioner to the Five Civilized Tribes to determine the right as between the appellant and Eva Waters to the land described in the petition, came on regularly to be heard before said Commissioner, appellant participating therein by counsel, and the Commissioner thereupon duly and regularly and in accordance with law awarded said land to Eva Waters; that under the rules of practice of said Interior Department relating to such proceedings, appellant was allowed thirty days within which to appeal, but that he failed so to do, and on August 18, 1909, said decision, under said rules, became final; that on August 21, 1909, the principal chief of the Cherokee Nation, pursuant to said decision and the duty imposed by law (sec. 58, act July 1, 1902, 32 Stat., 725), executed a deed or patent to the land to said Eva Waters, the effect of which was to convey to the latter all the right, title, and interest of the Cherokee Nation in said land, and, on August 25, 1909, the Secretary of the Interior approved the same as required by section 59 of said act of July 1, 1902, which approval operated as a relinquishment to the grantee of all the right of the United States in and to the land embraced in the patent and placed the same beyond the jurisdiction and control of appellee; and appellee prayed in and by said "supplemental answer" to be hence dismissed. Appellant filed a demurrer thereto, which was overruled by the court below. He then filed a general replication, and the appellee joined issue thereon.

On December 13, 1909, the cause was heard by the court below, and a judgment was entered discharging the rule to show cause and dismissing the original and amended petitions, from which judgment this appeal has been prosecuted. Upon said hearing, the appellant offered to read in evidence the depositions taken by him upon the issues originally joined, but the court declined to permit the same, to which ruling an exception was noted. Appellee then offered in evidence, upon the issue joined on the supplemental answer, said patent or deed to Eva Waters, dated August 21, 1909, for the land here involved, to which appellant objected, but said objection was overruled and exception noted.

Under the assignments of error but two general and controlling questions are presented for our determination, viz:

1st. Did the court below err in admitting in evidence the patent to Eva Waters issued by the appellee during the pendency of the cause below, and in refusing to permit appellant to read his testimony in evidence?

2d. Was the appellee acting within his lawful jurisdiction
115 in refusing to deliver the patent to appellant?

1. It is well settled that the improper admission of evidence in trials by a court without a jury does not of itself constitute reversible error, as the improperly admitted evidence will be rejected by the appellate court and the cause decided as if it were not in the

record. Field v. United States, 9 Pet., 182. Arthurs v. Hart, 17 How., 6. So that, while we are clearly of opinion that the action of the appellee in issuing said patent was incompetent as a defense to this action, in view of the settled rule that impossibility of performance can not be pleaded in defense to mandamus where such performance was rendered impossible by defendant's own act (Spelling on Injunctions and Extraordinarry Remedies, 2d ed., sec. 1377; High on Extraordinary Legal Remedies, 3d ed., sec. 14), the judgment below should not be reversed for that error, nor for the refusal of the court below to permit appellant to read his testimony in evidence, if the record itself sustains the judgment below upon the ground that the appellee acted within his lawful jurisdiction in refusing to deliver a patent to appellant as prayed for in the petition for mandamus herein.

2. Was the appellee acting within his lawful jurisdiction in refusing to deliver the patent to appellant? If so, the petition for mandamus was properly dismissed. In Garfield v. U. S. ex rel. Goldsby, 211 U. S. 249, at p. 262, the United States Supreme Court said:

"We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law."

It is also well settled, of course, that, after the right to the patent has become complete, the execution and delivery of the same are but mere ministerial acts of the officers charged with that duty. Garfield v. U. S. ex rel. Goldsby, supra; Ballinger v. U. S. ex rel. Frost, 216 U. S., 240. Both of these cited cases involved the same act of Congress here concerned, namely, the act of July 1, 1902 (32 Stat. L., 716, et seq.), and the United States Supreme Court held that the issuance and delivery of an allotment certificate by the Commission to the Five Civilized Tribes was the act which made the right to a patent for any designated allotment complete. Before the issuance and delivery of such allotment certificate, there is still jurisdiction to refuse the patent. After its issuance and delivery the delivery of the patent becomes a mere ministerial act.

It being admitted upon the pleadings in this case that no allotment certificate has ever been issued to appellant, and further that a motion for review of the decision of May 10, 1909, was filed by Eva Waters within the time allowed by the rules of practice obtaining in the Department of the Interior in Indian affairs, and that, after a further hearing, the order of May 10, 1909, was vacated and an order entered directing that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, it follows that the appellee was acting within his lawful jurisdiction in refusing to deliver said patent to appellant, and, so acting within his lawful jurisdiction, the admission in evidence of the patent to Eva Waters did not constitute reversible error, nor did the refusal of the court to permit appellant to read his testimony in evidence.

We are unable to agree with the contention of the appellant that the rules of practice obtaining in the Department in reference to rehearings and reviews were inapplicable to this case, nor with appellant's further contention that the filing of appellee's "Supplemental Answer" operated as an abandonment upon his part of every contention except the one sought to be put in issue by it. No authority has been cited by appellant in support of the former contention, and the authority cited as supporting the latter contention, namely, Thompson v. United States, 103 U. S., 431, merely holds that a fact arising since the filing of a return can not be given in evidence without a plea puis darrien continuance.

In our opinion there was no error in dismissing the petition and the judgment below is affirmed with costs.

Affirmed.

116 TUESDAY, *October 4th, A. D.* 1910.

No. 2138, October Term, 1910.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Appellant,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE ANDERSON.

October 4, 1910.

117 TUESDAY, *November 1st, A. D.* 1910.

Mr. Chief Justice Shepard did not sit in this case.

No. 2138.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Appellant,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior.

On motion of Mr. William Hitz, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America on the relation of Herman Knight, Appellant, and Richard A. Ballinger, Secretary of the Department of the Interior, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 1st day of November, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by:

——— ———,
———— ———.

119 Know all men by these presents, That we, Herman Knight, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto Richard A. Ballinger, Secretary of the Interior, in the full and just sum of three hundred ($300) dollars, to be paid to the said Richard A. Ballinger, Secretary of the Interior, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and successors, jointly and severally, by these presents. Sealed with our seals and dated this 1st day of November, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Herman Knight, as appellant, and Richard A. Ballinger, Secretary of the Interior, as appellee, a decree was rendered against the said Herman Knight and the said Herman Knight having prayed and obtained a writ of error to the Supreme Court of the United States to reverse the

decree in the aforesaid suit, and a citation directed to the said Richard A. Ballinger, Secretary of the Interior, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Herman Knight shall prosecute said appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HERMAN KNIGHT, [SEAL.]
By WILLIAM HITZ, [SEAL.]
His Attorney in Fact.
AMERICAN SURETY COMPANY OF NEW YORK. [SEAL.]

[Seal of the American Surety Company of New York.]

L. BERT NYE, [SEAL.]
Resident Vice President.

Attest:

CLAUDE B. BROWN,
Resident Assistant Secretary.

Sealed and delivered in presence of:

——— ———.

Approved by:

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2138. The United States of America on the relation of Herman Knight, appellant, vs. Richard A. Ballinger, Secretary of the Department of the Interior. Bond on writ of error to Supreme Court U. S. Court of Appeals District of Columbia. Filed Nov. 2, 1910. Henry W. Hodges, Clerk.

120 UNITED STATES OF AMERICA, *ss:*

To Richard A. Ballinger, Secretary of the Department of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America on the relation of Herman Knight, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 2nd day of November, in the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 2d day of November, A. D. 1910.
OSCAR LAWLER,
Att'y for Def't in Error.
R. W.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 2, 1910. Henry W. Hodges, Clerk.

121 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 120 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States of America on the relation of Herman Knight, appellant, vs. Richard A. Ballinger, Secretary of the Department of the Interior, No. 2138, October term, 1910, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 3rd day of November, A. D. 1910.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,379. District of Columbia Court of Appeals. Term No. 163. The United States of America on the relation of Herman Knight, plaintiff in error, vs. Richard A. Ballinger, Secretary of the Department of the Interior. Filed November 4th, 1910. File No. 22,379.

9

Office Supreme Court, U. S.
FILED.
MAR 8 1911
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. [redacted] 163.

UNITED STATES OF AMERICA EX REL. HERMAN KNIGHT, PLAINTIFF IN ERROR,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
WILLIAM HITZ,
For Plaintiff in Error.

JAMES W. ZEVELY,
JAMES M. GIVENS,
EDGAR SMITH,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 758.

UNITED STATES OF AMERICA EX REL. HERMAN KNIGHT, PLAINTIFF IN ERROR,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The defendant in error has moved for the dismissal of the writ of error herein upon the following grounds, viz:

First. That the question presented is a moot one;

Second. That this court is without jurisdiction to entertain the writ;

Third. That there is no bill of exceptions contained in the record and therefore there is no question properly before the court for review.

In the alternative he moves for the affirmance of the judgment of the court below "because it is manifest the writ of error was taken for delay only."

In opposition to such motion we submit with confidence—

First. That the questions presented by the record in this cause for the decision of this court are not only not moot, but on the contrary are of living and vital importance, involving and necessitating decision as to concomitant relations and duties of the Executive and Judicial branches of the Government of the United States, and particularly decision of the question as to whether when the judiciary has taken jurisdiction of a proceeding in *mandamus* having for its object the compelling of a supposed or claimed ministerial action by and on the part of the head of an executive department, such head of department, after making return to a rule to show cause duly served upon him in the course of such proceeding and after answer and the joinder of issue thereon, may, without notice to the applicant or permission of the court administering the cause, by his own voluntary and willful act taken in anticipation of

possible mandatory interference by the court, oust the jurisdiction of the court and so escape and avoid possibility of such interference.

The authorities, both elementary and judicial, are numerous, satisfactory, and are at one in declaring that—

> "impossibility of performance cannot be pleaded in defense to mandamus where such performance was rendered impossible by defendants' (respondents') own act."

The Court of Appeals of the District of Columbia, having this case before it on appeal and being confronted with the suggestion now submitted to this court, viz., that the questions raised by the pleadings had become moot by reason of the subsequent action of the respondent in issuing a patent for the land in dispute to one other than the present plaintiff in error, said:

> * * * "we are clearly of opinion that the action of the appellee (respondent) in issuing said patent (after the joinder of issue in the cause) was incompetent as a defense to this action, in view of the settled rule that impossibility of performance cannot be pleaded in defense where such performance was rendered impossible by defendant's own act (Spelling on Injunctions and Extraordinary Remedies, 2d ed., sec. 1337; High on Extraordinary Legal Remedies, 3d ed., sec. 14)," * * *

but nevertheless held that the judgment of the Supreme Court of the District of Columbia uphold-

ing the admissibility in evidence of the patent to the land in controversy, issued as set forth in the supplemental answer of the respondent herein filed (extracts from Record, p. 49), *i. e.*, on August 27, 1909 (*Ib.*, 38), after joinder in issue and notice of hearing had been filed, July 30, 1909 (*Ib.*, 36), should not be reversed upon such ground if the record itself, upon other grounds, could be made to support it; and upon consideration, affirmed the judgment of the Supreme Court of the District of Columbia on points of law involving the merits of the case as a whole.

The disposition so made of such points of law afford here the grounds of error upon which the claim of right to have the final judgment of the Court of Appeals reviewed by this court is based.

Second. That this court is possessed of full jurisdictional power to hear and determine the issues presented on the writ of error herein, and so far from conceding that the record in the cause discloses

> "that the Secretary of the Interior had jurisdiction of the controversy which resulted in awarding the land in question to a person other than the plaintiff in error,"

or that

> "such jurisdiction was exclusive, and his (the Secretary's) action is not subject to review by any court, in the absence of fraud or gross mistake of fact" (Motion, etc., p. 2),

we emphatically, though respectfully, deny each of such supposed concessions, and, if permitted, will argue before this honorable court that the unwarranted conclusions as to jurisdictional power so claimed on the part of the Secretary of the Interior are opposed to the very essence of the contentions on behalf of relator, and that such contentions having been resolved erroneously by the Court of Appeals of the District of Columbia, furnish the basis for reversible error in this court.

Third. If the omission of a bill of exceptions from the transcript of record in this cause in truth constitutes such a fault in procedure as ought to prevent a review of the judgment of the lower court by this court, such objection would not be open to appellee on this motion in the present state of the motion papers, for it cannot be ascertained with certainty and beyond question from the "Extracts from Record" furnished to the court by defendant in error that the transcript of record on file in the clerk's office may not contain such a bill of exceptions.

The "Extracts from Record" do not purport to reproduce the entire transcript of record, and the long and thoroughly established practice of this court is that the motion papers must present the case in such manner and fullness as to enable the court "to act understandingly without referring to the transcript on file."

National Bank *vs.* Insurance Co., 100 U. S., 43.

Waterville *vs.* Van Slyke, 115 U. S., 290.

But if it should be conceded, as it well might be, that the transcript of record on file does not contain any bill of exceptions, defendant in error's motion, in so far as this point is concerned, must fail, for it has never yet been decided either by this court or by any court of the District of Columbia *in a mandamus proceeding* that a formal bill of exceptions, duly settled and filed, is necessary to preserve for purposes of review questions raised and passed upon by the trial court.

On the contrary, it has been said by this court (Waite, C. J.) that such

> "proceeding may be likened to a creditor's bill in equity which is resorted to in aid of execution,"
>
> Davies *vs.* Corbin, 112 U. S., 36, 40,

and it has been indicated by the same high authority that where a statute gives a remedy by mandamus but does not undertake to regulate the process or procedure by which it is to be secured, the practice established in the tribunals whence the case comes governs the procedure.

> Davenport *vs.* Dodge County, 105 U. S., 237, 243.

So far as reported in the books and so far as known to the attorneys for plaintiff in error, bills of exception have never been held to be either acceptable or necessary by the courts of the District of Columbia in the conduct of proceedings in mandamus.

There exists respectable authority for the assertion that bills of exception are no part of the adjective law of mandamus (Territory *vs.* Browne, 7 Mexico, 568), and in the absence of any decision of this court to the contrary, it would seem that if the absence of a bill of exceptions from the present transcript of record affords seeming ground upon which to predicate a motion to dismiss, full opportunity should be afforded for its proper investigation and for its reasonable argument.

Fourth. It is respectfully denied that the writ of error herein was taken for delay, and it is also denied that the order of May 10, 1909, upon which opponents are pleased to assert that relator predicates his demand for the assistance which the writ of mandamus would afford him, "was simply an interlocutory order made by the Assistant Secretary of the Interior."

The grounds of each of these denials, as well as of the denial which we here also make of opponents' contention that said order was subject to reconsideration under the rules of the Department of the Interior on an application for rehearing, will fully appear in the more elaborate statement of case and argument which follows.

Statement of Case.

The relator, Herman Knight, a duly enrolled citizen by blood of the Cherokee Nation (possessing less than one-half, viz., one-quarter, Indian blood), in due course and on the 28th day of August, 1907, made application to the Commissioner to the Five Civilized Tribes to select in part satisfaction of allottable lands to which he was entitled under the provisions of the act of Congress entitled "An act to provide for the allotment of the lands of the Cherokee Nation," etc., etc., approved July 1, 1902 (32 Stats. L., 716, ch. 1375), the tract of land described in his petition for mandamus herein (Extracts from R., 2, 26).

At the date of relator's said application said lands, together with other adjoining lands, had been selected by Maudie Waters "as a tentative allotment for her minor child, Eva Waters" (R., 2); but the right, if any, of the class of citizens of the Cherokee Nation to which said minor, Eva Waters, belonged, to select or receive allotments of the lands belonging to the Cherokee Nation was then in dispute, and under the provisions of the act of Congress of March 1, 1907 (34 Stats. L., 1015, ch. 2285), had become the subject of litigation in the United States Court of Claims and later occupied the attention of this court, which directed the dismissal of the suits which had been brought by certain named Cherokee Indians "for themselves and all others similarly situated" to de-

termine the validity of the very acts of Congress (Muskrat *vs.* United States, 219 U. S., 346) under which said Maudie Waters, as mother and natural guardian of Eva Waters, claimed the right to have allotted to the latter the land in question.

Relator, under and pursuant to the "Rules of Practice in Choctaw, Chickasaw, and Cherokee Allotment Contest Cases" (R., 6-12), filed in the office of the Commissioner to the Five Civilized Tribes a contest against said Waters selection (R., 2, 37), and this contest proceeded in such course that it culminated on May 10, 1909, in a formal opinion and decision on the part of Frank Pierce, First Assistant Secretary of the Interior, who had jurisdiction and full charge of the proceeding, from which (copy in full being Exhibit "C" to relator's petition, R., 13-16) it appears that the minor, Eva Waters, had been "born between the 1st day of September, 1902, and the 4th day of March, 1906," and was consequently, at the date of the institution of the contest by Knight, less than five (5) years of age; that the lands involved in the tentative selection made in her interest were some "fifty acres of valuable oil land situated near Tulsa, Oklahoma"; that the application for allotment to her of the entire fifty (50) acres, had been made to the Department "through her father and mother"; that her said application as to the west twenty (20) acres thereof was contested by one Twist, and as to the other thirty (30)

acres was contested by Herman Knight; that all the parties to both contests are Indians belonging to the Cherokee Tribe; that the Act of Congress which went into effect July 27, 1908 (being the act of May 27, 1908, 35 Stats. L., 312, ch. 199), removed all restrictions (on alienations) from all three of these parties, and the Department retained jurisdiction over said lands "solely for the purpose of perfecting the allotments and preserving and protecting the land from waste, pending the final determination of the allotments and issuing of patents" (Extracts from R., 13); that on the trial of Twist *vs.* Waters the Commissioner to the Five Civilized Tribes rendered judgment in favor of Twist, and said judgment on appeal to the Commissioner of Indian Affairs had been reversed; that no trial had been had in Knight *vs.* Waters, but, on April 6, 1909, C. W. Waters and Maudie Waters, the father and mother of the minor, Eva Waters, acting as guardians of said minor, filed motions on said minor's behalf in each case, respectively asking that she "be allowed to confess judgment in favor of Twist" and "to retire from the (that) case upon payment for her use of the sum of $4,800," and that she likewise "be permitted to confess judgment in favor of Knight upon payment for her use of the sum of $7,200" (*ib.*, 14); that the Commissioner to the Five Civilized Tribes recommended "that the proposed compromise be approved and that the girl receive the $12,000 and relinquish her claim to the

entire fifty acres of land, provided no better offer can (could) be obtained" (*ib.*, 14); that Mr. A. R. Serven, claiming to represent the legal guardian of the minor, "contended that a better settlement than $12,000 could be secured for the minor," and "the Department was and is now of opinion that the offer of $12,000 should not be accepted, and so announced to the two attorneys, *and to other attorneys who represented the interests of oil men in and around Tulsa*" (italics ours); that "since the hearing, the Little Rock Oil Company" and others, "through their attorney, J. W. Zevely, have offered to pay the minor $25,000 for a relinquishment of her claim and an award of the land to the respective contestants"; that the "questions for the Department to determine now are two: (1) Will (*sic*) this minor child be permitted to withdraw?" This question, because "the uncertainty of the outcome of this controversy is so overbearing (*sic*) upon the Department," the Department resolved by concluding "that a reasonable compromise of her rights should be accepted"; and (2) Which of the "propositions before the Department should be approved?" as "the controversy has narrowed itself down to such narrow limits that it is simply a question as to which of the three parties may have the land," and "*if the minor is to be permitted to withdraw, there is no legal objection standing in the way of awarding the thirty acres to Knight and the twenty acres to Twist, and patents be issued to them speedily*" (italics

ours); that it was therefore decided to approve the $25,000 proposition, to permit the minor to withdraw her contest, and to award the land to Twist and Knight, respectively (*ib.*, 15); that "in accepting this offer the Department will insist that the fund shall not be diminished by any charges upon it for attorneys' fees," and "Mr. Zevely's clients will be given up to and including the 15th instant to make the payment of $25,000" (*ib.*, 16).

This opinion and decision of the Department of the Interior by its First Assistant Secretary was, under date of May 12, 1909, endorsed:

> "Respectfully referred to the Commissioner to the Five Civilized Tribes for appropriate action. John Francis, Jr., Acting Chief Land Division."

It plainly appears from this opinion and decision that both the Commissioner to the Five Civilized Tribes, who recommended that the "proposed compromise" embraced in the offer of $12,000 to be paid to Eva Waters for the relinquishment of her claim to the entire fifty acres, and the allotment of such acreage to Twist and Knight respectively, should be approved "provided no better offer can be obtained," and the First Assistant Secretary of the Interior, who was "of opinion that the offer of $12,000 should not be accepted, and so announced to the two attorneys and to other attorneys who represented the interests of oil men in and around Tulsa," understood

that the statutory right of selection in both Twist and Knight was of primary importance for the purposes of the proposed compromise and the making of title to the lands, but considered it of but secondary importance when compared with the possibility of obtaining an enhanced sum of money for the benefit of little Eva.

Prior to May 10, 1909, the date of the Secretary's decision relied upon as constituting the first step of the platform upon which the right to the relief demanded by the petitioner is predicated, viz., by act approved May 27, 1908, entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes" (35 Stats. L., 312, ch. 199), the Congress had declared:

> "That from and after sixty days from the date of this act" (*i. e.,* from and after July 27, 1908) "the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or encumbrance, be as follows: All lands, including homesteads, of said allottees enrolled" * * * "as mixed blood Indians *having less than half Indian blood,* including minors, *shall be free from all restrictions*" * * * (italics ours).
>
> * * * * * * *
>
> "SEC. 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the

> *quantum* of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this act and the enrollment of the records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.
>
> "That no oil, gas or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this act, but the same shall be subject to the approval of the Secretary of the Interior as if this act had not been passed."

As Knight was possessed of less than one-half, viz., only one-quarter of Indian blood (Extracts, &c., 6), it is plain that at the date of the Secretary's decision, viz., May 10, 1909, any lands that either had been or might be allotted to him were and would continue to be absolutely free from any and all "restrictions on alienation or encumbrance," and it was this statute and this feature of the applications then pending before him that caused the First Assistant Secretary to declare (Extracts, &c., p. 13) that:

> "The act which went into effect on the 27th day of July, 1908, removed all restrictions from these Indians. Therefore as soon as the land is allotted and patents are issued, the jurisdiction of the Interior Department ceases and the property to whomsoever it goes, whether contestants or con-

> testee, is absolutely beyond the control of the Department. The Department retains jurisdiction solely for the purposes of perfecting the allotment and preserving and protecting the land from waste, pending the final determination of the allotment and issuing of patents."

It was this perfect understanding upon his part as to the freedom from restriction on either alienation or lease of these lands if allotted to any one of the three mixed-blood Indians making application therefor, that caused him to further announce to the attorneys for the Indian applicants "and to other attorneys who represented the interests of oil men in and around Tulsa" that the offer of $12,000—made up of $4,800 for the twenty acres contested by Twist, and $7,200 contested by Knight (Extracts, &c., 14)—which the Commissioner to the Five Civilized Tribes recommended should be approved if no better offer could be had—would not be accepted.

And it was this perfect understanding on his part of the legal rights of the parties applicant, and of the relations then existing between the contestants Twist and Knight and "the Little Rock Oil Company, P. J. White, Thomas White, and W. J. Lewis," who, through attorney J. W. Zevely, "offered to pay the minor $25,000 for a relinquishment of her claim and an award of the land to the respective contestants," that caused the First Assistant Secretary to declare that "the controversy has narrowed itself down to such narrow limits

that it is simply a question as to which of the three parties may have the land"; that "if the minor is to be permitted to withdraw, there is no legal objection standing in the way of awarding the thirty acres to Knight and the twenty acres to Twist, and patents be issued to them speedily": and that he had

> "therefore decided to approve the $25,000 proposition, to permit the minor to withdraw her contest, and to award the land to Twist and Knight, respectively," and "that the $25,000 should be paid over to the Secretary of the Interior, as trustee, to be paid by him to a trust company as the guardian of the girl" * * * "or to such guardian as will be approved by the Department,"

concluding with the announcement that

> "Mr. Zevely's clients will be given up to and including the 15th instant to make the payment of the $25,000" (*ib.*, 16).

In furtherance of this conclusion and decision said First Assistant Secretary of the Interior on the 11th day of May, A. D. 1909, that is, the day following the decision itself, telegraphed to the Acting Commissioner of the Five Civilized Tribes, at Muskogee, Oklahoma, as follows:

> "Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty-five thousand dollars for use of Minor Waters contestants given including

> fifteenth to make payment. Upon receipt of thirteen thousand more within time allowed forward entire twenty-five thousand to department endorsed to Secretary when entire fund received by you. Prepare deeds respective contestants and have them executed and forwarded here for approval. Report promptly by wire."

In response the Commissioner to the Five Civilized Tribes advised the Secretary of the Interior of the due compliance with the terms of his said telegram and forwarded to him "a deed properly executed by the Chief of the Cherokee Nation conveying to" * * * "relator the lands above described" (*ib.*, 28, 20).

But, as appears from the petition for *mandamus*,

> "notwithstanding the fact that the Secretary of the Department of the Interior directed the Principal Chief of the Cherokee Nation to execute this particular deed; and, notwithstanding there is no discretionary power left in the Secretary of the Department of the Interior relative to said transaction."

and although

> "after the 11th day of May, A. D. 1909, the Secretary of the Interior authorized and empowered relator to have his tenant proceed with the development of said premises, and that pursuant to the authority so conferred, relator's 'said tenant is now upon said lands

> and has already laid out and expended large sums of money in prosecuting an effort to produce oil and natural gas from underneath said premises.' "

said Secretary

> "refuses to deliver said deed to your relator properly recorded as provided by law."

Asserting that nothing remained to be done by the Secretary of the Interior "except the purely ministerial duty of delivering the said deed," relator prayed the assistance of a writ of *mandamus* commanding the said Secretary to forthwith deliver "said deed properly executed as required by law in such cases."

July 16, 1909, rule to show cause "why the writ of *mandamus* should not issue as prayed in said petition" was issued and served on "Richard A. Ballinger, Secretary of the Department of the Interior, by service on Frank Pierce, Acting Secretary," the same day (Extracts, &c., 17).

July 23, 1909, "Frank Pierce, First Assistant Secretary of the Interior, and, in pursuance of law, acting as secretary thereof in the absence of Richard A. Ballinger, Secretary of the Interior," by way of answer, showed cause, briefly as follows:

He admitted—

(*a*) that Herman Knight was a citizen of the Cherokee Nation, by quantum of one-quarter Cherokee blood;

(*b*) that as such citizen of the Cherokee Nation he was entitled to an allotment of lands under the act of July 1, 1902;

(*c*) that on August 28, 1907, he had made application to the Commissioner to the Five Civilized Tribes at the Cherokee Land Office to take in allotment the land described in the petition for *mandamus;* that said land had been tentatively selected for the minor Eva Waters; that the question as to the right of the class to which Eva Waters belonged to make selection at all was in litigation and undetermined (Extracts, &c., pp. 19, 26); that on May 10, 1909, he had announced that he would "in due course of administration" and "in the absence of any facts which might thereafter develop to change such determination, award to said relator the right to select said land under the provisions of the act of Congress of July 1, 1902 (*ib.*, 19); that he had sent the telegram (above quoted) of May 11, 1909, to the Acting Commissioner to the Five Civilized Tribes; and that the Principal Chief of the Cherokee Nation had signed and executed "a deed of the land in controversy to the relator" and same had been forwarded by him to the Department of the Interior, but denied that he (respondent) had approved said deed, and averred that without such "approval said deed is insufficient to pass any title to the land in controversy either out of the Cherokee Nation as such or of the reversionary interest of the United States in said land."

Respondent further admitted refusal to deliver said deed to relator and denied the existence of any duty upon him to deliver the same; but admitted that "upon announcing his permission that the contestee, Eva Waters, might withdraw from the contest, he did state that, when relator had made full payment of the stipulated sum, he might then enter into possession, and that he, respondent, would direct issuance of patent or deed for the land in controversy" (*ib.*, 21); that under the rules of practice obtaining in the Department of the Interior thirty days are allowed for the filing of motions for review and that within such period of time counsel for Eva Waters presented such a motion; that in permitting the withdrawal of Eva Waters, through her guardian, respondent had been moved so to do by the representation of relator's counsel "that the consideration offered was amply commensurate with the extent of her potential interest in said land" (*ib.*, 22); that Eva Waters had "protested against allowance of said withdrawal," claiming the same had "been induced by gross misrepresentations of the value of the land in controversy;" that counsel for relator "neither raised nor advanced any objection as to your respondent's complete jurisdiction" to entertain said motion for review, but appeared generally and endeavored by argument on the merits to induce denial of the same, but that afterwards, on June 24, 1909, "respondent being satisfied that the consideration offered for said withdrawal was inadequate, and that he had been misled in adjudg-

ing what the best interests of the Indian ward, said Eva Waters, required," he had vacated said order of May 10, 1909, and thereafter directed that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with and disposed of on its merits and directed "that the money deposited on behalf of relator should be returned to the party depositing it;" that "under the law relating to the allotment of lands in the Cherokee Nation, the Commissioner to the Five Civilized Tribes is directed to issue allotment certificates as evidence of the right of an allottee to the land selected as his allotment as a step preliminary to the issuance of a deed or patent (*ib.*, 24) thereto, and that no such certificate of allotment has ever been issued to said relator;" that it is also provided by said law (sec. 59) that

> "All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in this patent,"

And that therefore "no deed or patent is valid or sufficient to pass title until approved by him and recorded in the office of the Commissioner to the Five Civilized Tribes;" that "until title passes he" (respondent) "has exclusive jurisdiction and control of all matters pertaining to such allotments;" that "his approval of such deed or patent is not a ministerial duty," that "pursuant to his

duty and his right he has refused to approve a deed of the lands herein in controversy to the said relator."

July 28, 1909, the relator filed replication to respondent's answer, wherein he reiterated, among other things, that on May 10, 1909, the Secretary of the Interior "did accept from the relator a large sum of money in consideration whereof" Eva Waters "was permitted to withdraw from said contest;" that on May 10, 1909, "relator was in lawful possession of the lands in controversy;" that said Secretary "authorized Herman Knight to proceed through his tenants with the prosecution of developments for oil and natural gas without waiting for the physical delivery to the said relator of a deed or patent to the land;" that of the total sum of $25,000 the sum of $15,000 was to be attributed to the thirty (30) acres contested by relator (the 20 acres claimed by Twist are not involved in these proceedings); that relator "paid said sum ($15,000) to the Secretary of the Interior for the benefit of said minor, Eva Waters, and on May 13, 1909," * * * "erected on said land derricks and other machinery necessary for the drilling for oil and natural gas, and said derricks and machinery were on said land and the work was being prosecuted prior to and on May 24, 1909" (*ib.*, 32); that said Secretary was not moved to the action taken by him in this regard upon (by) any representation made by counsel for relator, but was moved solely and entirely to the action taken

by him by investigations conducted upon his own account;" that "after a full hearing, both by brief and oral argument," and by his "own investigation of the physical fact—having himself been on the premises in controversy — he" (the Secretary) * * * "demanded" * * * "the sum of $15,000" to be paid in consideration for the withdrawal of Eva Waters and the issuing to relator of a deed or patent for said land (*ib.*, 33, 34). Relator denied "that any misrepresentations of any character were made to the parent and guardian of Eva Waters as to the value of the land in controversy," averred that "the money (so) deposited on behalf of relator has not been returned to him," and denied that he assented to further proceedings being had at the instance of respondent in connection with said lands, and averred that when the contest proceeding "was called for trial at Muskogee on the 16th day of July, 1909," * * * "by his counsel he protested against any further steps being taken touching said land, stating as the ground of said protest that the land had already been patented to your relator and that the jurisdiction of the Department of the Interior touching said land had ceased" (*ib.*, 34). That relator, "by the action of the Secretary of the Interior directing the Principal Chief to issue patent to him, became entitled and is entitled to have the same delivered," and averred that his application for allotment of these lands to himself, "as well as these proceedings for a writ of *mandamus*, have been

and are maintained and prosecuted for his own benefit" (*ib.*, 35).

July 30, 1909, issue was joined on this return and notice of hearing was filed by the respondent (*ib.*, 36).

September 1, 1909, respondent filed a supplemental answer (*ib.*, 37), "reiterating, reaffirming and reasserting all, each and every of the matters and things set forth in his answer," and * * * "by way of *supplemental answer* stating that, on the 27th day of August, 1909, and in the ordinary course," a deed, "duly executed by the persons and in the manner required by law and duly approved by the said Secretary of the Interior," had been delivered through the office of the Commissioner of Indian Affairs, to the lawful guardian of said Eva Waters" * * * "conveying unto the said Eva Waters full and complete title in and to the land in dispute," and that said Eva Waters "is now, and ever since the approval and delivery of said deed has been, the absolute and unqualified owner of said property" (*ib.*, 38), by reason whereof neither the Department of the Interior nor any officer thereof has "any power, authority or jurisdiction over the land above described, nor has said Department of the Interior, or any officer thereof, any duty, right or authority to execute or deliver, or cause to be executed or delivered, any conveyance covering the said property to the relator herein, or to any other person" (*ib.*, 39).

October 6, 1909, the respondent moved to dismiss the petition for *mandamus* "because * * * of those matters set forth in respondent's supplementary answer filed, according to the requirements of law and rules of practice, in said action, on September 1, 1909, to wit, that title to the land in controversy has already passed to other parties and beyond the jurisdiction of your respondent to control," by reason whereof "the issues presented by the pleadings herein present purely a moot question" (*ib.*, 40).

October 13, 1909, the relator moved to strike respondent's supplementary answer from the files on the ground that same "was filed without leave of court * * * after issue had been joined," and that by said so-called supplemental answer "an entirely different issue was raised from that set up in the pleadings upon which issue had been joined and testimony taken" (*ib.*, 41).

October 14, 1909, the above motions having come on for hearing, the court granted leave to respondent "to file said (supplemental) answer on (as of) September 1, 1909, *nunc pro tunc*" (*ib.*, 42), and thereupon relator having demurred to said supplemental answer, relator's motion to dismiss the petition was withdrawn and said demurrer was "overruled, with leave to petitioner to plead over as advised within ten days" (*ib.*, 43).

October 25, 1909, relator filed replication to respondent's supplemental answer denying "each

and every of the allegations of the so-called supplemental answer" (*ib.*, 44), and on October 28, 1909, respondent joined issue on "relator's replication to respondent's supplementary answer to the rule to show cause" (*ib.*, 45).

Upon the issues so made by the pleadings and upon notice to respondent, relator took various depositions tending to support issues of fact on his behalf raised. No part of any of these depositions has been printed in the "Extracts from Record" submitted by defendant in error on the motion to dismiss, but all of said depositions appear in full in the duly certified transcript of the record on file in this cause in the clerk's office of this court.

These depositions, among other things, contain the statement under oath of various men having expert knowledge of values of land in the "Tulsa Oil Field," all of whom agreed in opinion that the lands involved in this contest were reasonably worth from $100 to $200 an acre, and that the offer of $12,000 made to the Commissioner to the Five Civilized Tribes for the withdrawal of the Eva Waters application and the allotment of the land to Twist and Knight, respectively, adequately represented the reasonable value of the Waters interest therein.

Deponent, E. R. Perry, deposed that subsequent to the rendition by the First Assistant Secretary of the Interior of his opinion and decision of May

10, 1909, in this case, he had conversed with the latter thereabouts on two or three different occasions, and that shortly after said May 10, 1909, and "before the motion for review had been filed by attorneys for Eva Waters," said Secretary had stated to him (Perry) that "he had authorized the lessees of William J. Twist and of Herman Knight, respectively, to take possession and proceed to operate the land by development," and that subsequently, in the presence of the Commissioner to the Five Civilized Tribes, Mr. J. George Wright, "Mr. Pierce again said that he had authorized these lessees to go on and proceed with the development," and again, in the presence of one H. P. Anderson, of Tulsa, Mr. Pierce had said to him (Perry) that "at the time that he awarded the land to Twist and Knight, respectively," he had "authorized their lessees to take possession immediately, and proceed with the development of the property, because of the fact that it was being rapidly drained."

J. George Wright, the Commissioner to the Five Civilized Tribes, deposed that he was such Commissioner in May, 1909, and that the telegram above set forth had been received in his absence by Thomas Ryan, the Acting Commissioner, and that the records of his office "showed that the conditions in (of) that telegram had been complied with;" that his office had received the money called for by said telegram, and that "the matter of permitting a relinquishment is a usual practice" and "there

have been many instances of withdrawal of application by one party or the other, in contest cases."

D. H. Bynum, Chief Clerk to the Commission to the Five Civilized Tribes, deposed that upon receipt of the telegram above mentioned he had "directed one of the employees to proceed to Shiatook, the residence of the Cherokee chief, to secure the execution of the two deeds for this land to Twist and Knight;" that those deeds were "prepared upon the usual and regular form of deeds or patents that were issued to Cherokee citizens," and that same, after having been executed by the principal chief of the Cherokee Nation, W. C. Rogers, had been returned to deponent and were thereupon transmitted "to the office of the Secretary of the Interior at Washington, and the Secretary of the Interior notified by telegraph, confirmed by letter, of the fulfillment of "the direction of the Secretary in his telegram of May 11th;" that certified checks for the amount of money mentioned in said telegram were delivered to deponent and "after endorsement by Commissioner Wright, the endorsee (payee ?), they were transmitted to the Department" * * * "at the same time the deeds were transmitted—that is, on or about May 15th; that "checks aggregating $12,000 were delivered to the office several days in advance of two other checks aggregating $13,000;" that the four checks mentioned "aggregate the sum of $25,000," and the checks for such amount still "are in the safe of

the disbursing agent for the Commissioner to the Five Civilized Tribes;" that Charles Waters, the father and legal guardian of Eva Waters, "made two applications to relinquish and confess judgment for this land," and "Maudie Waters, mother and natural guardian" of this minor, subsequently joined in such application; that such motion to confess judgment in the case of Knight, contestant, was in the following form:

> "Now comes the above named contestee, Eva Waters, a minor, by her father and legal guardian, C. W. Waters, and her mother, Maudie Waters, and makes this her motion to confess judgment, in favor of the contestant herein; and asks that she be allowed so to confess judgment, and that the land in controversy be allotted to the contestant, upon the following grounds, and for the following reasons: The contestee, through her mother, Maudie Waters, filed upon the land in controversy on the 7th day of August, 1907; said land is described as follows: N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4, of Sec. 19, Township 20 N., Range 13 East, containing 30 acres, more or less. Thereafter, and on the blank date of blank, 190–, the above named contestant, Herman Knight, lodged a contest against this contestee in the office of the Commissioner to the Five Civilized Tribes, seeking to obtain the above described land in allotment, and the said contest ever since has been, and now is, pending. The contestee is entitled to an allotment, if at all, under the act of April 26, 1906, and not otherwise. And the right

of this contestee to enrollment or to an allotment of the lands of the Cherokee Nation has never been finally decided, and it is still a matter of doubt as to whether she will receive an allotment. The contestant, Herman Knight, is an adult citizen of the Cherokee Nation on the regular rolls thereof. Since the institution of said contest, the said land has become by reason of prospecting for and development of lands in the vicinity for oil, very valuable for oil purposes. The lands immediately adjacent to this land on all sides have been developed for oil, and there are now on all of the lines of this land producing oil wells, as are shown on the map attached and marked 'Exhibit 1.' That some of said wells have been producing for at least six months, and have drained the land during all of that time. And the wells at present producing are being shot and are rapidly draining the land in contest of all oil located underneath the same. That if the land is so drained much longer it will lose practically all of its value for oil and gas, and that said value is all which the land possesses. The guardian of said contestee has arranged with the contestant a compromise of this contest by the terms of which the contestant is to be allowed to file on the land and the contestee is to withdraw this contest. In consideration the contestee to receive the sum of $7,200.00, which is to be deposited in escrow as the Commissioner directs, payable when patents have issued to the said contestant. The guardian of the said contestee has made diligent enquiry and investigation, and from all of the information which he has obtained is of the opinion that it would be very much to the interest

of the contestee that said compromise shall be made, so that the value of said oil under the land may be saved, and at the same time the contestee receive for the same a fair compensation.

Wherefore, the contestee by her guardian as aforesaid, prays the Commissioner that the contestee be allowed to confess judgment, and withdraw her filing from the land in contest, and be allowed to file elsewhere.

(Signed) C. W. WATERS,
Guardian of Eva Waters, Minor.
MAUDIE WATERS,
Mother of Eva Waters.

STATE OF OKLAHOMA,
County of Muskogee, ss:

C. W. Waters, being first duly sworn, deposes and says that he is the legal guardian of Eva Waters, a minor, the contestee in the above contest; that he has read the above motion for confession of judgment, and understands the same, and that the same is true.

(Signed) C. W. WATERS.

Subscribed and sworn to before me this 6th day of April, 1909.

WALTER W. CHAPPELL,
Notary Public."

It also appears from said depositions that under date of June 30, 1909, the First Assistant Secretary of the Interior instructed the Commissioner of Indian Affairs "to inform the Commissioner to the Five Civilized Tribes that the Department desired him to proceed at once to hear and adjudicate the

latter case (Knight *vs.* Waters) and to make" his action thereon special;

> "To insure expedition on the part of all concerned, it is also directed that no dilatory tactics whatever be permitted, and that all unnecessary delays be avoided in all offices of the Department as to this case."

And such instructions were duly received and acted upon by said Commissioner.

The respondent, the Secretary of the Interior, took no depositions and does not appear to have made any effort to substantiate by testimony of any sort the suggestion made in the course of his answer to the effect that "the consideration offered for said withdrawal was inadequate, and that he had been misled in adjudging what the best interests of this Indian ward, said Eva Waters, required" (*ib.*, 23), nor did he make any attempt whatever, otherwise possibly than by innuendo, to connect the relator or his counsel, or any other person acting on relator's behalf or in his interest, with the suggested successful attempt to mislead.

The cause having come on for hearing before the Supreme Court of the District of Columbia on the 13th day of December, 1909, relator offered to read the above-mentioned depositions in evidence, "but the court declined to admit said depositions to be read in evidence, to which ruling exception was noted" (Extracts from Record, p. 49).

Thereupon the respondent "offered in evidence a patent to the land in controversy issued as set forth in the supplemental answer of the respondent herein filed, to which (offer) objection was made by the relator and (said objection was) overruled" and the patent was admitted in evidence, "to which ruling the relator then and there noted an exception" (*ib.*, p. 49).

This patent, which bears date August 21, 1909, is signed by W. C. Rogers, principal chief of the Cherokee Nation, has the great seal of said nation affixed, and purports to "grant and convey unto said Eva Waters all right, title and interest of the Cherokee Nation, and of all other citizens of said nation, in and to "the land involved in the Knight application, together with other lands aggregating in the whole the sum of "eighty (80) acres more or less, as the case may be, according to the United States survey thereof, subject, however, to all the provisions of said act of Congress."

It evidences its own approval by the Secretary of the Interior under date of August 25, 1909, and purports to have been filed for record in the office of the Commissioner to the Five Civilized Tribes on the 27th day of August, 1909 (*ib.*, 47).

Upon consideration the Supreme Court of the District of Columbia, having admitted in evidence before it the certified copy of the patent in question and evidently moved to such course by the

contents of the supplemental answer of the respondent, to the effect that—

> "by reason and on account of the execution and delivery of said deed (patent) * * * the said Department of the Interior has not, nor has any officer thereof, any power, authority or jurisdiction over the land above described, nor has said Department of the Interior, or any officer thereof, any duty, right, or authority to execute or deliver, or cause to be executed or delivered, any conveyance covering the said property to the relator herein (Knight) or to any other person" (*ib.*, 38, 39),

ordered the rule to show cause herein to be discharged and "the original and amended petition (to) be and the same are hereby dismissed, with costs against said relator" (*ib.*, p. 49).

From this decree dismissing his said petition relator prayed and duly perfected an appeal to the Court of Appeals of the District of Columbia. In that court the Assistant Attorney General for the Interior Department and other associated counsel on behalf of the respondent, the Secretary of the Interior, moved to dismiss the appeal or affirm the decree of the lower court upon the following grounds:

> (1) Because it appears from the record that a patent has issued to the land in controversy to a person other than appellant, and appellee cannot be compelled to issue another patent to the same land. Where-

fore the case presents but a moot question.

(2) Because appellant has no further interest in the subject-matter of this case, having abandoned his allotment of the land in controversy and secured the allotment to himself of other lands in their place and stead as shown by the exhibits attached to this motion.

(3) Because there is no bill of exceptions in the record herein, and therefore no question properly presented to this court for review.

(4) Because appellant has failed to file herein fifteen copies of a printed brief at least five days before the case is liable to be called for argument as required by section 3, rule No. VIII of this court.

(5) Because it is manifest that the appeal was taken for delay only (*ib.*, p. 54);

and upon consideration of such motion the Court of Appeals, after stating that appellant's (relator's) contention was that the proceedings had in and under the direction of the Department of the Interior subsequent to the execution of the patent (deed) for the lands in contest in favor of Knight were "in excess of the Secretary's jurisdiction, although he admits in his petition that under the rules of practice obtaining in the Department of the Interior in Indian affairs *thirty days are allowed from and after notice of a decision within which to file a motion for rehearing or review*, a copy of said rules being annexed to his petition as 'Exhibit B'

and made a part thereof" (Extracts from Record, pp. 56, 57), declared that—

> "Under the assignments of error but two general and controlling questions are presented for our determination, viz:
>
> "1st. Did the court below err in admitting in evidence the patent to Eva Waters issued by the appellee during the pendency of the cause below, and in refusing to permit appellant to read his testimony in evidence?
>
> "2d. Was the appellee acting within his lawful jurisdiction in refusing to deliver the patent to appellant?"

and upon consideration, held as hereinbefore indicated, that while—

> "the action of the appellee (respondent Secretary of the Interior) in issuing said patent was incompetent as a defense to this action, in view of the settled rule that impossibility of performance cannot be pleaded in a defense to mandamus where such performance was rendered impossible by defendant's own act (Spelling on Injunctions and Extraordinary Remedies, 2d ed., sec. 1337; High on Extraordinary Legal Remedies, 3d ed., sec. 14), the judgment below should not be reversed for that error, nor for the refusal of the court below to permit appellant to read his testimony in evidence, *if the record itself sustains the judgment below upon the ground that the appellee acted within this lawful jurisdiction in refusing to deliver a patent to appellant as prayed for in the petition for mandamus herein*" (*Ib.*, p. 60).

With respect to the second question, viz:

> "Was the appellee (respondent Secretary of the Interior) acting within his lawful jurisdiction in refusing to deliver the *patent to appellant*,"

the Court of Appeals, quoting from Garfield *vs.* U. S. *ex rel.* Goldsby, 211 U. S., 249, 262, to the effect that the Congress by numerous acts of legislation had conferred authority upon the Secretary of the Interior to administer upon the Indian lands and that this court had refused "to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law," and, as we think, wrongly apprehending the purport and result of the opinions of this court delivered in both Goldsby's case (*supra*) and Ballinger *vs.* U. S. *ex rel.* Frost, 216 U. S., 240, declared that as this court had held that "the issuance and delivery of an allotment certificate by the Commissioner to the Five Civilized Tribes was the act which made the right to a patent for any designated allotment complete," that therefore "Before the issuance and delivery of such allotment certificate, there is still jurisdiction to refuse the patent," although "after its issuance and delivery the delivery of the patent becomes a mere ministerial act," and as it appeared from the pleadings

> "that no allotment certificate has ever issued to appellant, and further that a motion for review of the decision of May 10, 1909, was filed by Eva Waters within the time allowed by the rules of practice obtain-

ing in the Department of the Interior in Indian affairs, and that, after a further hearing, the order of May 10, 1909, was vacated and an order entered directing that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, it follows that the appellee was acting within his lawful jurisdiction in refusing to deliver said patent to appellant, and, so acting within his lawful jurisdiction, the admission in evidence of the patent to Eva Waters did not constitute reversible error, nor did the refusal of the court to permit appellant to read his testimony in evidence.

"We are unable to agree with the contention of the appellant that the rules of practice obtaining in the Department in reference to rehearings and reviews were inapplicable to this case, nor with appellant's further contention that the filing of appellee's 'Supplemental Answer' operated as an abandonment upon his part of every contention except the one sought to be put in issue by it. No authority has been cited by appellant in support of the former contention, and the authority cited as supporting the latter contention, namely, Thompson *vs.* United States, 103 U. S., 431, merely holds that a fact arising since the filing of a return cannot be given in evidence without a plea *puis darrein* continuance" (*ib.*, pp. 60, 61).

The judgment of the Supreme Court of the District of Columbia dismissing the petition for mandamus was accordingly "affirmed with costs."

To review this judgment of affirmance a writ of error from this court was sued out and perfected and the case thereby brought here.

ARGUMENT.

We deem it unnecessary to pay more than passing attention to the paragraph appearing on printed page 9 of Motion to Dismiss or Affirm, which reads as follows:

> "On February 3, 1910, plaintiff in error (Herman Knight) filed an application for lands in the Cherokee Nation to the exclusion of the lands involved in this case. The lands so applied for by plaintiff in error have been duly allotted to him and allotment certificate has been issued therefor" (see Appendix),

Or to the argument (Point I.) contained in printed pages 10, 11, 12, and 13 of said Motion to the effect that "plaintiff in error subsequent to the filing of his petition for Mandamus in the court below, abandoned his contest for the land involved in this suit by application for allotment of other lands, which have been duly allotted to him to the exclusion of the lands involved herein and in full satisfaction of his allotment right."

If it be not open to the respondent in this case to evade and avoid possible judicial interference by pleading the subsequent issuing of a patent for the land in controversy to one other than the relator, it would seem to be equally incompetent for him to strengthen such supposed defense by showing or attempting to show that in addition to contumaciously issuing a patent for the land in controversy

to one other than the relator, he had also by some arrangement, possibly with the relator himself, undertaken to bestow upon the relator allottable lands of the Cherokee Nation in excess of the amount legally allottable to him.

The matters disclosed by the "Appendix to Motion to Dismiss or Affirm, and brief thereon," filed with said motion, form no part of the transcript of the record pending in this court, and were not before either the Supreme Court of the District of Columbia or the Court of Appeals of said District for their consideration; consequently they cannot be supposed to have in any wise entered into or have affected the judgment here presented for the consideration and review of this court.

If it be assumed contrary, as we think, to what is properly assumable, viz., that the application of an allottee for an additional allotment, the acreage of which, when added to the acreage of prior applications, would make the whole exceed the total acreage legally allottable to such allottee, even in the absence of any express relinquishment of prior applications must be taken to operate *pro tanto* as such, nevertheless we think that such principle cannot and should not be applied in the case at bar, for here, as was well known to respondent, the relator's allotment rights had become complicated by equities in favor of "Mr. Zeveley's clients," "the Little Rock Oil Company, P. J. White, Thomas White, and W. J. Lewis," whose offer to pay $25,000.00 for a relinquishment of the Waters claim if followed

by an allotment of the lands covered thereby to Twist and Knight had been accepted by the Secretary of the Interior, and whose money in the shape of certified checks for at least $15,000.00 still rests in the office of the Commissioner to the Five Civilized Tribes.

We have had no opportunity to investigate either the bearing or the truth of the suggestion for which the papers set forth in the "Appendix" appear to afford a basis, but it would seem to be significant that although the supposed additional application for allotment bears date February 3, 1910, and the supposed additional allotment certificate in favor of Knight and based thereon bears date April 28, 1910, and although said certificate is reported to have been forwarded to Knight "at Wilmar, Minnesota, on May 9, 1910," nevertheless, it has never been delivered to Knight either at Wilmar or elsewhere, and it would seem to be particularly significant that in response to a telegram from the First Assistant Secretary to the Commissioner to the Five Civilized Tribes of date of about January 6th, 1910, the latter official, in advising of the non-delivery of such certificate, states that while the records of his office do "not show when the certificate in question was returned," "it was probably within the last few days, *as an entry of the fact that it was returned was made only today*" (Appendix, p. 3).

If the contention as to the want of jurisdiction and power on the part of the Secretary to entertain further proceedings with respect to the Waters lands after the patents therefor in favor of Twist and Knight had been fully executed by the Principal Chief of the Cherokee Nation, pursuant to the direction of the Secretary of the Interior and of the Commissioner to the Five Civilized Tribes be correct—and the correctness of such contention cannot be finally determined until this court has heard and passed upon argument for and against it—the attempt on the part of the Secretary of the Interior to nullify the prior application of Knight, in which he (Knight) had parted with the beneficial interest, by favoring him with additional allotments based upon subsequent applications would seem to be of no monent, at least in so far as the merits of the pending case are concerned.

As the whereabouts of Knight, a supposititious ward of the Government for whose welfare the Secretary of the Interior is especially chargeable by law, are unknown to his guardian, and seemingly have been so unknown for several months past, it is not passing strange that in the short space which has elapsed since the filing of the motion to dismiss herein we have not found it possible to obtain from him an explanation of the application for additional allotment imputed to him, or a declaration as to its truth or falsity.

Having parted with his beneficial interest in these lands at the time of the acceptance of the offer of "the Little Rock Oil Company" and others, "Mr. Zevely's clients," whom the Secretary gave "up to and including the 15th instant to make the payment of the $25,000" (Extracts, &c., pp. 15, 16), it may be accepted as reasonably evident that in his proper person the relator retains but little, if any, direct personal interest in the pending proceeding, and it might not be entirely beyond the range of possibilities to suppose that he would not be averse to accepting as many additional allotments in excess of his aliquot legal allotment as the Secretary of the Interior might see fit to favor him with.

Point II, beginning on printed page 13 of the "Motion to Dismiss," &c., so far from finding foundation in the transcript of the record, is expressly negatived thereby.

The misapprehension evidenced in this Point seems also to have pervaded in part the opinion of the Court of Appeals. In that opinion it is stated (p. 57), and that the statement might not be overlooked it was partly italicized, that petitioner "admits in his petition that under the rules of practice obtaining in the Department of the Interior in Indian affairs *thirty days are allowed from and after notice of a decision within which to file a motion for rehearing or review,*" while in the motion to dismiss, quoting from the 13th paragraph of the answer, it is stated that the averment of respondent to above effect was "not denied or

traversed by the replication," and (p. 14) "The admission by petitioner that under the rules and regulations of the Department of the Interior Eva Waters had the right to file a motion for review, &c., carries the conclusion that the Secretary of the Interior still had jurisdiction and control of the controversy."

Neither branch of this statement is correct, and *par consequence* the deduction therefrom is unfounded.

The petition contains no such admission, and petitioner's replication (Extracts, &c., p. 34), responding to paragraph fourteen of respondent's answers, expressly denied the jurisdiction of the Secretary of the Interior to proceed further with the contest proceedings subsequent to the execution of the deed for said land by the Principal Chief; and averred that when said contest case was called for trial at Muskogee "then and there by his counsel he protested against any further steps being taken touching said land, stating as the grounds of said protest *that the land had already been patented to your relator and that the jurisdiction of the Department of the Interior touching said land had ceased*" (*ib.*, 34).

Point III in support of the motion to dismiss has, perhaps, already been sufficiently answered in this opposition. As hertofore said, there is no established practice peculiar to this court and no rule or otherwise established practice prevailing in the courts of the District of Columbia or at

common law, requiring the presence of a bill of exceptions to preserve, for purposes of review, points of law raised in the orderly course of proceedings in mandamus. The cases of Michigan Insurance Co. *vs.* Eldred, 143 U. S., 293, and Jennings *vs.* P., B. & W. R. R. Co., 218 U. S., 255, have no application to and afford no guide for decision as to the proper practice to be followed in such cases. It it were otherwise, still Point III would not be well taken, for it is settled that when the point of law to be reviewed is apparent in or upon the record, as where the judgment or decree of the lower court itself presents the point or matter complained of and upon which the court acted, no bill of exceptions is necessary to preserve it.

Insurance Co. *vs.* Plaggeer, 16 Wallace, 378.

Clinton *vs.* Missouri Pac. R. R., 122 U. S., 469.

City of Wilmington *vs.* Ricard, 90 Fed. Rep., 221.

In the case at bar the decree itself evidences the relator's offer "to read in evidence the depositions (identifying them by their marks) heretofore taken and filed in this cause"; the refusal of the court "to admit said depositions to be read in evidence," and the noting by the court of relator's exception to such ruling. It also evidences respondent's offer in evidence of the "patent to the land in controversy issued as set forth in the supplemental answer of the respondent" and relator's

objection thereto; the admission by the court of said patent in evidence and the exception by relator to the court's ruling in such regard (Extracts, etc., p. 49).

It would seem both upon principle and authority that the points of law so raised have been not only properly but sufficiently preserved for all purposes.

In the lower courts relator contended that respondent, by filing his supplemental answer, in legal effect abandoned every contention opposed to the relief sought save only the single issue tendered by said supplemental answer, viz., that by respondent's execution and deliverey of the patent to Waters subsequent to the joinder of issue in the cause, neither the Department of the Interior nor any officer thereof had any further power, authority, or jurisdiction over the land described," nor "any right or authority to execute or deliver, or cause to be executed or delivered, any (further) conveyance covering the said property to the relator."

With this contention the Court of Appeals stated that it was "unable to agree," observing that a certain authority cited in support of it "merely holds that a fact arising since the filing of a return cannot be given in evidence without a plea *puis darrein* continuance' (*Ib.*, p. 61). But it is elemental at common law, and the rule has not been altered in the courts of the District of Columbia, that a plea *puis darrein continuance* supersedes all

other pleas and defenses submitted in the cause, and on the record, in such cases, the cause of action is admitted to the same extent as would have occurred if no other defense than that contained in the plea *puis* had been submitted.

Yeaton *vs.* Lynn, 5 Peters, 224, 231.
Wallace *vs.* McConnell, 13 Peters, 136, 152.
Wisdom *vs.* Williams, Fed. Cases, 17, 904.
Scott *vs.* Brokaw, 6 Blackford, 243.

In the case last cited it was held that where, as in the case at bar, such plea is bad in itself, the opposite party is entitled to judgment.

It has been said that this rule proceeds upon the hypothesis that the party filing such plea assumes a new ground of defense to the action, and abandons all defenses theretofore relied upon; and again, that such plea in fact, strikes from the record, *by operation of law,* all previous pleas and everything stands confessed except the matter contested by the plea *puis.*

Angus *vs.* Chicago Trust, &c., Co., 170 Illinois, 298.
Waterbury *vs.* McMillan, 46 Mississippi, 635.

The rule as thus stated seems to be well settled in England,

Bacon's Abridg. Pleas, & Pl., 2.
Barber *vs.* Palmer, 1 Ld. Raym., 693.
Vaughan *vs.* Brown, 2 Stra., 1106,

and to be supported by the practically unbroken line of decisions in Alabama, Arkansas, Illinois,

Indiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Wisconsin, and, perhaps, of other States.

ON THE MERITS.

If relators contention that under the act of Congress of July 1, 1902 (32 Stat. L., 716), providing for the allotment of the lands of the Cherokee Nation, title to the lands here involved, passed to him upon the execution by the Principal Chief of the deed or patent therefor in relator's favor, be well founded, it is plain that the departmental rule of practice providing for the filing of motions for rehearing within thirty days after, etc., has neither bearing nor any place here.

If this case stood alone upon an advantage claimed under or by virtue of the Secretary's decision of May 10, 1909, it might readily be conceded that the objection to the issuing of the writ of mandamus based upon such rule and the subsequent performance of the Secretary in supposed consonance with it, would give rise to much difficulty and might possibly, and ever reasonably, be held to be sufficient to defeat the action.

But relator's contention, is, as it has always been, that by the payment and receipt of the $15,000 demanded by the Secretary and the execution and delivery by the Principal Chief of the deed or patent covering the land, the title to such land

vested in relator and all that was left to the Secretary of Interior, under the law, was to perform the purely ministerial duty of delivering said deed or patent to relator for recordation, after notation of the Secretary's "approval" thereon.

The Court of Appeals met this contention by citing Goldsby's and Frost's cases (*wbi post*), observing with reference thereto that—

> "the United States Supreme Court held (therein) that the issuance and delivery of an allotment certificate by the Commission to the Five Civilized Tribes was the act which made the right to a patent for any designated allotment complete."

And that—

> "Before the issuance and delivery of such allotment certificate, there is still jurisdiction to refuse the patent. After its issuance and delivery the delivery of the patent becomes a ministerial act,"

concluding that as no allotment certificate had ever been issued to relator in this case, the Secretary "was acting within his lawful jurisdiction in refusing to deliver said patent to" him.

But the conclusion thus expressed presents a familiar example of *non sequistur,* for it ignores the possibility of the vesting of title in allottees otherwise than by the formal and physical issuance of such a certificate.

As relator's legal right to relief by mandamus, if any he has, is based squarely upon the proposi-

tion that in the exercise of their legitimate functions under the powers conferred upon them by said act of July 1, 1902, both the Commission to the Five Civilized Tribes and the Secretary of Interior had so acted as to render the execution and delivery of a certificate of allotment unnecessary, it becomes necessary to re-examine the provisions of the act and the opinions of this court in the cases cited, in order to ascertain what if any administrative function involving the exercise of judgment or discretion with respect to the passing of title to this land, inhered or remained to or in the Secretary of Interior after the Principal Chief of the Cherokee Nation, acting in strict pursuance of the concurring conscious and intended direction and orders of both of such officials, had signed, sealed, and forwarded to the Secretary for "approval" and delivery the deed or patent in question.

The act of July 1, 1902 (3 Stats. L., 716, ch. 1375, is entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes."

Sections 1 to 8, inclusive of said act, prescribe definitions for various words and phrases contained therein, among others that the words "principal chief" or "chief executive" shall be held to mean the principal chief of said (Cherokee Nation or) tribe; that the words "Dawes Commission" or "Commission" shall be held to mean the United

States Commission to the Five Civilized Tribes; that the word "minor" shall be held to mean males under twenty-one and females under eighteen years of age; the word "select" and "its various modifications, as applied to allotments and homesteads, shall be held to mean *the formal application at the land office* (italics ours), to be established by the Dawes Commission, * * * for particular tracts of land; words importing the masculine gender apply to females as well, and plurals include the singular and vice versa.

Section 9 provides for an appraisement of the allotable lands of the Cherokee Nation, to be made "by the Commission to the Five Civilized Tribes," section 10), and declares that in determining the value of allotable lands no consideration is to be given to the location thereof, nor to any timber that may be thereon, nor to any mineral deposits contained therein, nor to improvements located thereon.

> "SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

"SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation."

"SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

"SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands."

"SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes."

"SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, *and no child born thereafter to a citizen*, and no white person who has intermar-

ried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, *shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.*" (Italics ours.)

"SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever, for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

"SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act."

* * *

"SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, *or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent* conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate" (italics ours).

"SEC. 59. All conveyances *shall be* approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent" (italics ours).

"SEC. 62. All patents, when so executed and approved, shall be filed in the office of the Dawes Commission, and recorded in a book provided for the purpose, until such time as Congress shall make other suitable provision for record of land titles, without expense to the grantee, and such records shall have like effect as other public records."

"SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior."

"SEC. 69. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor."

'SEC. 70. Allotments may be selected and homesteads designated for minors by the father or mother, if citizens, or by a guardian, or curator, or the administrator having charge of their estate, in the order named; * * * but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties."

"SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing pur-

> poses only, and for a period not to exceed five years for agricultural purposes. but leases for a period longer than one year for grazing purposes and *for a period longer than five years for agricultural purposes and for mineral purposes* may also be made with the approval of the Secretary of the Interior and not otherwise."

Sections 25 and 26 are quoted merely to show the substantial basis of the doubt expressed in the motion for leave to confess judgment filed by the parents of Eva Waters, as to her right to make selection of allotable lands at all, and section 70 is quoted merely to establish the plenary power conferred upon the father and mother of a minor citizen to act in making selections and designations of allotable lands on the minors' account.

Herman Knight was a duly enrolled citizen of the Cherokee Nation (Extracts, &c., p. 6).

His right to select and to be allotted by the Commission to the Five Civilized Tribes, lands selected by him equal in value to one hundred and ten acres of the average allotable lands of the Cherokee Nation was fixed by section 11 of the act of July 1, 1902, *supra.*

By section 22 of said act that Commission, under the direction of the Secretary of the Interior, was possessed of "exclusive jurisdiction" "to determine *all* matters relative to the appraisement and the allotment of lands."

By section 21 the "allotment certificates" issued by "the Commission are made "conclusive

evidence of the right of an allottee to the tract of land described therein."

By section 58 the Principal Chief is required "to execute and deliver" to the allottee a patent conveying all the right, title and interest of the Cherokee Nation, * * * in and to the lands embraced in his allotment certificate and this patent is to be made out on blanks furnished to the Principal Chief for such purpose by the Secretary of Interior.

By section 59 the Secretary of Interior is required—"shall"—to approve all such conveyances and such approval operates as a relinquishment to the grantee of the right title and interest of the United States in and to the land described therein.

It is evident from the foregoing that prior to the execution and delivery of the patent for any particular allotment by the Principal Chief, the Secretary of Interior has no duty other than that of general direction to perform with respect to any matter pertaining either to the appraisal or allotment of such land, for exclusive jurisdiction in such respect is expressly conferred upon the Commission; and it is equally as evident that after the patent has been executed and delivered by the Principal Chief, the Secretary has no function to perform with respect thereto, other than the mandatory function, involving neither judgment or discretion, of noting his "approval" on the patent or conveyance so executed.

The circumstance that in furthering the convenience of allottees and possibly of expediting the despatch of the business the patents may have been sent by the Principal Chief direct or through the Commission to the Five Civilized Tribes to the Secretary for his approval instead of being delivered by the Principal Chief to the allottees, as the law prescribes, is but fortuitous, and cannot affect or in anywise alter the right of the allottee to demand from the Secretary both his "approval" and the consequent delivery of the patent.

Under the circumstances of the case at bar the patent executed and delivered by the Principal Chief at the instance and by discretion of the Commission to the Five Civilized Tribes, after full consultation with, and pursuant to the direction of the Secretary of the Interior served the double purpose of an allotment certificate and of a conveyance of the lands described therein. The law does not prescribe the form of allotment certificates, and the Secretary's telgram of May 11, 1909, acquiesced in as it was by the Commission, was the equivalent of an allotment certificate, if it did not in fact constitute one. In any event, the acceptance of the $15,000, fixed by the Secretary himself, as the price for clearing the record of the more than doubtful claim of the minor Eva Waters, and the simultaneous execution and deliverey of the formal patent,—an instrument of higher dignity than the allotment certificate,—would seem to

have, rendered the issuance of a more formal certificate unnecessary.

The very letter of section 58 of the above-mentioned act negatives the idea that the right of an allottee to receive a patent can only become fixed by the prior issuance to him of an allotment certificate. By that act it is made the duty of the Principal Chief to execute and deliver to allottees patents when the citizen allottee has has received "his allotment of land," as evidenced perhaps by the recipt of the allotment certificate therefor, or "*when any allotment has been so ascertained and fixed that title should, under the provisions of this act, be conveyed.*" It would seem to be difficult, if not impossible, to maintain, in the case at bar, that the allotment selected by Knight and relinquished by the parents of the minor Waters, had not been so ascertained and fixed that title under the provisions of the act ought not to be conveyed.

The case at bar in principle seems quite clearly to be ruled by the case of Ballinger *vs.* U. E. *ex rel.* Frost, 216 U. S., 240, wherein this court affirmed the judgment of the Court of Appeals, which in its turn had affirmed a judgment of the Supreme Court of the District of Columbia granting a mandamus requiring the Secretary of the Interior to deliver or cause to be delivered a patent to an Indian allottee, under circumstances less favorable to the allottee than those disclosed by the present case.

Frost was a citizen and resident of the Choctaw Nation, entitled to an allotment of the lands of that Nation under the act of Congress of June 28, 1898 (30 Stats. L., 495, ch. 517), which provided for such allotments "under the direction of the Secretary of the Interior" and also provided "that as soon as practicable after the completion of said allotment, the Principal Chief of the Choctaw Nation and the governor of the Chickasaw Nation should jointly execute, under their hands and the seals of their respective nations, and deliver to their allottees, patents conveying to them all the right, title, and interest of the Indians in and to the lands allotted.

Frost having selected the lands there in dispute: and nine months having elapsed without any contest against her selection having been initiated, a certificate of allotment was issued to her and thereafter the Principal Chief of the Choctaw Nation and the governor of the Chickasaw Nation executed under the seals of their respective nations, a patent for the lands embraced therein.

The act of July 1, 1902 (32 Stat. L., 641, ch. 1362), ratifying the above indicated agreement between the Choctaws and the Chickasaws, and providing in detail for the allotment and conveyancing of the allotable lands was very similar in terms to the act of the same date (32 Stat. L., 716, ch. 1375), providing for the allotment of the lands of the Cherokee Nation,—sections 23 and 24 of the former act being practically identical with sections 21 and 22 of the latter.

After the execution of the patent to Frost, the Secretary, for reasons satisfactory to himself, and no doubt equally potent with those supposed to have existed in the case at bar, directed the cancellation of Frost's allotment "with leave to select other lands to fill her right to tribal lands in severalty." The patent that had previously been issued to her was returned and remained on file in the office of the Commissioner of Indian Affairs, to be cancelled" (p. 248).

This court, speaking through Mr. Justice Brewer, said:

> "The Interior Department has general control over the affairs of the Indians, wards of the Government. In addition, the Secretary of the Interior was, by these several acts, specially charged with the duty of supervising the action of the Commission to the Five Civilized Tribes in making the allotments authorized by these acts. On both of these grounds he claims authority to have done what he did, and that his acts in that respect are not subject to review by the courts."

But after citing and quoting from Cornelius *vs.* Kessel, 128 U. S., 456, 461, and Archard *vs.* Alexander, 157 U. S., 372, 383, it was declared that,

> "Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior. * * * However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation."

and noting that in the case then under discussion "the title of the allottee to the land selected" had become fixed, "and the chief authorities of the Choctaw and Chickasaw nations (had) executed to her a patent" therefor, the court declared that—

> "Thereafter the Secretary of the Interior had nothing but the ministerial duty of seeing that a (the) patent was * * * delivered."

As in Frost's case so in the case at bar, the authorities especially and exclusively empowered by the pertinent acts of Congress had executed under the great seal of the Cherokee nation a patent for the lands embraced therein to Knight.

As in Frost's case so in the case at bar nothing remained to be done by the Secretary but the purely perfunctory and ministerial duty of noting his "approval" thereon and seeing that it was duly delivered to the patentee.

To like effect in general, and equally forceful, are the opinions of this court in—

Garfield *vs.* U. S. *ex rel.* Goldsby, 211 U. S., 249.

Roberts *vs.* United States, 176 U. S., 221.

Noble *vs.* Union River Logging Co., 147 U. S., 165.

Frasher *vs.* O'Connor, 115 U. S., 112.

Butterworth *vs.* U. S. *ex rel.* Hoe, 112 U. S., 50.

United States *vs.* Schurz, 102 U. S., 378.

Barney *vs.* Dolph, 97 U. S., 652.

In view of the circumstances of this case and particularly in view of the large sums of money paid to and remaining in the possession of the Commission to the Five Civilized Tribes for the benefit of the minor Eva Waters, and the other large sums expended upon the strength of and faith in the Secretary's decision of May 10, 1909, and his telegram of instructions of May 11, 1909, in improving and developing the lands by erecting derricks and drilling for oil, it would seem, that the instance case, while equally as strong in point of law as any one of the cases above cited excels them all in that strength which equities may add.

Upon the whole case it is respectfully submitted that the motion to dismiss or affirm should be denied, or in any event should be postponed to the hearing on the merits in order that its many inconsistencies and its lack of substantial merit may be the more fully and perhaps the more persuasively exposed.

FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
WILLIAM HITZ,
Attorneys of Record for the Plaintiff in Error.

JAMES W. ZEVELEY,
JAMES M. GIVENS,
EDGAR SMITH,
Of Counsel.

INDEX.

	Page in Original Record	Page Herein
Caption	1	1
Petition	1	1
Exhibit "A"—Certificate of J. G. Wright	5	6
Exhibit "B"—Rules of practice in allotment contest cases	5	6
Exhibit "C"—Letter from Frank Pierce, first assistant secretary, to Commissioner of Indian Affairs	11	13
Rule to show cause	14	17
Marshal's return	14	17
Motion to dismiss	14	17
Answer of Richard A. Ballinger, Secretary of the Interior	15	19
Amended petition	21	26
Stipulation as to answer	24	30
Stipulation as to exhibits	24	31
Replication	25	31
Joinder of issue	29	36
Notice of hearing	29	36
Order setting cause for hearing	30	37
Supplemental answer	30	37
Motion to dismiss	99	40
Motion to strike supplemental answer	100	41
Notice of hearing	100	40
Order granting motion to hear J. W. Zevely and E. Smith on behalf of plaintiff	101	42
Order allowing answer to be filed nunc pro tunc; motion filed October 13, 1909, withdrawn; leave to demur granted and demurrer filed; motion of October 6, 1909, to dismiss petition withdrawn; demurrer overruled	101	42
Demurrer to supplemental answer	101	43
Replication to supplemental answer	102	44
Joinder of issue	103	45
Motion to set cause for hearing	103	45

	Page in Original Record	Page Herein
Copy of patent	104	46
Order discharging rule to show cause; prayers of original and amended petitions denied; dismissing original and amended petitions with costs; appeal	106	49
Memorandum; $100 deposited in lieu of bond on appeal	107	50
Docket entries	107	50-51
Directions to clerk for preparation of transcript of record	108	52
Memorandum; time in which to file transcript of record extended	109	53
Clerk's certificate, Supreme Court, D. C.	109	53
Motion to dismiss or affirm	110	54
Cause argued and submitted to Court of Appeals, D. C.	112	55
Opinion of Court of Appeals	113	55
Order affirming judgment of Supreme Court, D. C.	116	61
Writ of Error to Supreme Court of United States ordered issued	117	62

[1] **In the Court of Appeals of the District of Columbia.**

No. 2138.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Appellant.

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior.

Supreme Court of the District of Columbia.

At Law. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition, &c.

Filed July 16, 1909.

In the Supreme Court of the District of Columbia, — Term, 1909.

51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

To the Honorable —— ——, Justice of said Court:

Your relator Herman Knight, respectfully states as follows:

He is a citizen by blood of the Cherokee Nation and enrolled upon the approved roll of citizens by blood of said Nation as No.
[2] 16,760, age 26, as of September 1, 1902, and as quantum of blood, ¼ Cherokee, as is more fully shown by a certificate from the Commissioner to the Five Civilized Tribes, which certificate is attached hereto, made a part hereof, and marked Exhibit "A."

As such citizen of the Cherokee Nation he is entitled to an allotment of land as provided by the Act of Congress approved July 1, 1902, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for disposition of town-sites therein, and for other purposes."

On the 28th day of August, 1907, he made application to the Commissioner to the Five Civilized Tribes at the Cherokee Land Office to take in allotment the N. /2 of the S. E. /4 of the N. W. /4 and the S. W. /4 of the S. E. /4 of the N. W. /4 of Section 19, Township 20 North, Range 13 East, in the Cherokee Nation, now in the State of Oklahoma, and it appeared of record in the office of said Commissioner to the Five Civilized Tribes that on the 21st day of August, 1907, the said tract of land above described was selected by Maudie Waters to be taken as a tentative allotment for her minor child, Eva Waters. The right of the class of citizens of the Cherokee Nation to which Eva Waters belongs and the right of Eva Waters to select an allotment of the lands belonging to the Cherokee Nation, is now the subject of litigation in the United States Court of Claims at Washington, D. C., or in the Supreme Court of the United States, and is not yet adjudicated.

Under the rules of practice in Cherokee allotment contest cases before the Commissioner to the Five Civilized Tribes and the Commissioner of Indian Affairs and the Secretary of the Department of the Interior, as approved by the Secretary of the Department of the Interior, it was incumbent upon your relator to proceed in the matter of the selection of his allotment as he did proceed as hereinafter set forth. A copy of said rules of practice is attached hereto, made a part hereof, and marked Exhibit "B."

When, on the 28th day of August, 1907, your relator appeared at the office of the Commissioner to the Five Civilized Tribes for the purpose of selecting the above described land as a portion of his allotment, he ascertained that the said described lands had been previously tentatively set aside for Eva Waters, and your relator then and there filed a contest against the said tentative selection.

Under the said rules of practice the said contract instituted in the office of the Commissioner to the Five Civilized Tribes was pro-

ceeded with, there, and on appeal before the Commissioner of Indian Affairs, and thereafter, on appeal from the Commissioner of Indian Affairs to the Secretary of the Interior. These various proceedings had touching the said contest culminated in a decision by the Secretary of the Department of the Interior on May 1, 1909, awarding the land above described to your relator, as may be seen by the decision rendered by said Secretary of the Department of the Interior on said day, a copy of which decision is hereto attached and marked Exhibit "C."

On May 11, 1909, the Secretary of the Department of the Interior directed the Chief of the Cherokee Nation, whose duty [3] it was under the Act of Congress approved July, 1902, to execute deeds, to execute a deed to the above described land to Herman Knight and forward the same to said Secretary of the Department of the Interior for approval and delivery, as is more fully shown by a telegram in words and figures as follows, to-wit:

"29 Ks HI C 89 Collect Govt.

Dn—WASHINGTON, D. C., *May 11th*, 1909.

Ryan, Acting Com'r, Muskogee, Oklahoma:

Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty five thousand dollars for use of Miner Waters contestants given including fifteenth to make payment upon receipt of thirteen thousand more within time allowed forward entire twenty five thousand to department endorsed to Secretary when entire fund received by you. Prepare deeds to respective contestants and have them executed and forwarded here for approval report promised by wire.

FRANK PIERCE,
First Ass't Sec'y.

11.35 A. M.

Thereafter, and in response to the telegram above quoted the Commissioner to the Five Civilized Tribes advised the Secretary of the Department of the Interior of the due compliance by the relator with the terms of his said telegram and forwarded to the Secretary of the Department of the Interior a deed properly executed by the Chief of the Cherokee Nation conveying to your relator the lands above described. Said deed has been approved by the Secretary of the Interior. The relator complied with all of the requirements imposed upon him by law.

Notwithstanding the due execution by the Principal Chief of the Cherokee Nation of the deed aforesaid conveying the title to the lands aforesaid to your relator, and notwithstanding the due approval by the Secretary of the Department of the Interior of said deed in conformity to the provisions of the Act of Congress of July 1, 1902; and, notwithstanding the fact that the Secretary of the Department of the Interior directed the Principal Chief of the Cherokee Nation to execute this particular deed; and, notwithstanding there is no discretionary power left in the Secretary of the Department of the Interior relative to said transaction, he refuses to deliver said deed to your relator properly recorded as provided by law.

Your relator is entitled to have the said deed delivered to him as aforesaid.

It is the duty of the Secretary of the Department of the Interior to so deliver said deed to this relator.

This relator has no other remedy than by mandamus.

After your relator had performed all of the acts necessary and prescribed by law and prescribed by the rules and regulations of the Interior Department touching the selection of lands in [4] allotment in the Cherokee Nation, and after the 11th day of May, 1909, the Secretary of the Interior authorized and empowered your relator to have his tenant proceed with the development of said above described premises for the purposes of prospecting for and producing oil and natural gas from the said lands. In accordance with the said authority your relator has procured his said tenant to go upon said lands and said tenant is now upon the said lands and has already laid out and expended large sums of money in prosecuting an effort to produce oil and natural gas from underneath said premises.

Your relator further states as follows: The Secretary of the Department of the Interior has refused and still refuses to deliver the deed to your relator and has ordered other and further proceedings in the Department of the Interior relating to this subject-matter, and has misconceived the force and effect of the execution and approval of said deed. While it clearly appears that there remains in the Department of the Interior, and that there is left to the Secretary of the Department of the Interior no other or further duty touching this subject matter, save and except the purely ministerial duty of delivering the said deed to your relator, the said Secretary of the Department of the Interior asserts the right to refuse to deliver said deed to your relator upon the ground, as your relator is informed and believes from official notices received from the Sec-

retary of the Department of the Interior, that he, the said Secretary, still has supervision and control over the lands conveyed by said deed, and claims to have the right to yet allot said lands.

Wherefore your relator prays the granting of a writ of mandamus under the seal of this court directed to the said Secretary of the Department of the Interior, commanding him forthwith to deliver to your relator the said deed properly recorded as required by law in such cases, and to do and perform all such other acts and things in the premises as the law may require. And your relator asks all such other and further relief as may be right and just, and as in duty bound your relator will ever pray.

THOMAS WHITE,
Attorney in Fact.
ZEVELY, GIVENS & SMITH,
Att'ys for Pl'ff.

STATE OF OKLAHOMA,
Muskogee County, ss:

Thomas White, of lawful age, being first duly sworn according to law on his oath states: that he is the attorney in fact for the relator in the above petition for a writ of mandamus and that he knows the contents of said petition; and he states that the matters and things therein alleged are true in substance and in fact, save such things as are alleged upon information and belief and as to such matters alleged upon information and belief he believes them to be true; and that he has signed the name of the said Herman Knight to the said petition as the act and deed of the said Herman Knight under the authority of a power of attorney of said [5] Herman Knight.

THOMAS WHITE,
Attorney in Fact.

Subscribed and sworn to before me this 13 day of July, 1909.

CHESTER A. COWPER,
Notary Public.

[SEAL.]

My commission expires Dec. 16, 1909.

EXHIBIT "A."

Department of the Interior.

Commissioner to the Five Civilized Tribes.

Cherokee Roll, Indians by Blood.

Number.	Name.	Age.	Sex.	Blood.	Census card No.
16760	Knight, Herman (age, twenty-six)	26	M.	¼	7017

This is to certify, that I am the officer having custody of the approved roll of citizens by blood of the Cherokee Nation and that the above and foregoing is a true and correct copy of that portion of said roll appearing at Number 16760.

Enrolled as of September 1, 1902.

P. O. Vinita, Oklahoma.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

L. B. A., *Clerk.*

Muskogee, Oklahoma.
July 13, 1909.

EXHIBIT "B."

Rules of Practice in Choctaw, Chickasaw, and Cherokee Allotment Contest Cases Before the Commission to the Five Civilized Tribes, the Commissioner of Indian Affairs, and the Secretary of the Interior.

Department of the Interior.

Commission to the Five Civilized Tribes.

MUSKOGEE, INDIAN TERRITORY, *March* 17, 1903.

The following Rules of Practice in Choctaw, Chickasaw and Cherokee Allotment Contest Cases, approved by the Department, January 27, 1903, and March 9, 1903, are hereby promulgated [6] for the information and guidance of all concerned.

THE COMMISSION TO THE FIVE CIVILIZED TRIBES.

TAMS BIXBY, *Chairman.*

Rules of Practice.

Initiation of Contests.

RULE 1. Contests may be initiated by or on behalf of an adverse claimant against any party by or for whom a selection of land has been made in the Choctaw, Chickasaw or Cherokee Nations, for any sufficient cause affecting the right of possession of the land in controversy, by selecting the same land, and by filing a complaint with the Commission to the Five Civilized Tribes at the land office in the Nation in which the land lies.

RULE 2. When the allottee is deceased the contest shall be brought against the heirs of such deceased allottee, and the complaint shall state the names of all the heirs. If the heirs, or any of them, are non-residents of Indian Territory, or unknown, the complaint shall set forth the fact and be corroborated with respect thereto by the affidavit of one or more persons.

RULE 3. The complaint must conform to the following requirements:

(*a*) It must be written or partly written and partly printed.

(*b*) It must describe the land involved.

(*c*) It must state the land office where, the date when, and for whom the contestant selected said land.

(*d*) It must make party contestee the person who, by himself or through another, originally selected the land in controversy and state the date of such selection and by whom made.

(*e*) If the contestee is an infant or a person of unsound mind the complaint shall so state and shall also state the name of the guardian of such infant or person of unsound mind, if there be one, and if there be none the complaint shall state the name of the person having the infant or person of unsound mind in charge.

(*f*) It must set forth the facts which constitute the grounds of contest.

(*g*) It must be duly verified.

Notice of Contest.

RULE 4. At least thirty days' notice shall be given of all hearings before the Commission, unless by written consent an earlier day shall be agreed upon.

RULE 5. Notice of contest and summons must be made upon the blanks prepared and supplied by the Commission and must give a description of the land involved, state the time and place of the hearing, and, except in cases of notice by publication, have a copy of the complaint attached.

[7] Service.

RULE 6. Personal service shall be made in all cases where the party to be served is a resident of Indian Territory, except as provided in Rule 9 and shall consist in the delivery of a copy of the notice and summons to each of the contestees.

RULE 7. If the person to be personally served is an infant or a person of unsound mind, service shall be made by delivering a copy of the notice and summons to the guardian of such infant or person of unsound mind, if there be one. If there be none, then by delivering a copy to the person having the infant or person of unsound mind in charge, and also to the person who made the selection for such infant or person. And if the contestee is a prisoner, convict, aged and infirm person, or soldier or sailor of the United States on duty outside of the Indian Territory, service shall be made as herein otherwise provided, and a copy of the notice and summons shall also be served on the person who made the selection for such prisoner, convict, aged and inform person, soldier or sailor.

RULE 8. Personal service may be executed by any officer or person.

RULE 9. Notice may be given by publication only when it is shown by affidavit presented on behalf of the contestant, and by such other evidence as the Commission may require, that due diligence has been used, and that personal service cannot be made or that the person to be served is a non-resident of Indian Territory, or that the heirs of a deceased allottee against whom the contest is brought are unknown. The affidavit must also state the present post office address of the person intended to be served, if it is known to the affiant, and must show what effort has been made to obtain personal service.

Notice by Publication.

RULE 10. Notice by publication shall be made by advertising at least once a week for four successive weeks in some newspaper published in the nation where the land in contest lies. The first insertion shall be at least thirty days prior to the day fixed for the hearing.

RULE 11. Where notice is given by publication, a copy of the notice shall, at least thirty days before the day fixed for the hearing, be mailed by registered letter to each person to be notified at the last address, if any, given by him, as shown by the records of the Commission, and to him at his present address named in the affi-

davit for publication required by Rule 9, if such present address is stated in such affidavit and is different from his record address. If there be no such record address, and if no present address is named in the affidavit for publication, then a copy of the notice shall be so mailed to him at the post office nearest to the land. A copy of the notice shall also be posted in the land office where the contest is pending for a period of at least thirty days before the day fixed for the hearing, and still another copy thereof shall
[8] be posted in a conspicuous place on the land for at least two weeks prior to the day fixed for the hearing.

Proof of Service of Notice of Contest and Summons.

RULE 12. Proof of personal service of notice of contest and summons shall be the written acknowledgment of the person served or the affidavit of the person who served the notice, attached thereto, stating the time, place and manner of service.

RULE 13. Where service is by publication, the proof of service shall be a copy of the advertisement, with the affidavit of the publisher or foreman attached thereto, showing that the same was successively inserted the requisite number of times, and the date thereof. Proof of service by mail and by posting a copy of the notice on the land shall be the affidavit of the person who mailed the notice, with the post office receipt for the registered letter attached thereto, and the affidavit of the person who posted the notice on the land.

Dismissals.

RULE 14. Cases will be called for trial on the day and at the hour fixed for the hearing, and if the contestant makes no appearance the case will be dismissed for want of prosecution, in which event written notice of such action, by personal service or registered letter, shall be given by the Commission to the parties in interest or their attorneys.

Continuances.

RULE 15. A postponement of a hearing to a day to be fixed by the Commission may, for a valid reason, be allowed on the day of trial; and when the continuance is asked for on account of the absence of material witnesses, the party asking for the continuance shall file an affidavit showing;

(*a*) That one or more of the witnesses in his behalf is absent without his procurement or consent.

(*b*) The name and residence of each absent witness.

(*c*) The facts to which they would testify if present.

(*d*) The materiality of the evidence.

(*e*) The exercise of proper diligence to procure the attendance of the absent witnesses.

(*f*) That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed.

RULE 16. No continuance shall be granted on account of the absence of witnesses when the opposing party shall admit that the witnesses would, if present, testify to the statements set out in the motion for a continuance.

Trials.

RULE 17. Upon the trial of a contest the Commission will, in all cases when deemed necessary, personally direct the examination of witnesses in order to draw from them all facts within their
[9] knowledge requisite to a correct conclusion of any point connected with the case.

RULE 18. Due opportunity will be allowed opposing parties, or their counsel, to confront and cross-examine the witnesses introduced by either party.

RULE 19. Upon the day originally set for hearing and upon any day to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing. When testimony is taken in shorthand, the stenographer's notes must be written out and the written testimony then and there subscribed by the witness and attested by the officer before whom the same is taken, unless the parties, or their counsel, shall, by stipulation in writing, agree that the transcript of the stenographer's notes, duly verified, shall be considered the testimony of the witnesses with the same force and effect as if it had been signed by the witnesses.

Reinstatement, Rehearing, and Review.

RULE 20. Motions for reinstatement, after dismissal as provided in Rule 14, and for rehearing or review, must be filed within twenty days from service of notice of the final order or decision in case of personal service of said notice and within thirty days in case of service of said notice by registered letter, said motion first having been served on the opposite party or his attorney, either personally

or by registered letter. The party on whom the motion is served will be allowed the same length of time after service of motion in which to file a reply, service thereof first having been had on the opposite party, or his attorney, either personally or by registered letter.

RULE 21. Motions for rehearing or review must be accompanied by an affidavit of the party or his attorney to the effect that the motion is made in good faith and not for the purpose of delay.

RULE 22. In case of failure to file a motion to reinstate, or for rehearing or review, within the time prescribed by Rule 20 the case will be regularly closed.

Proof of Service of Motions, Replies, etc.

RULE 23. Proof of personal service of motions, replies, etc., shall be the same as that required by Rule 12. Proof of service of motions, replies, etc., by registered letter, shall be the affidavit of the person who mailed the letter, with the post office receipt therefor attached, and said affidavit shall state that the letter for which the receipt was given contained a copy of the original motion, etc., as the case may be. And in all cases of service by registered letter, the time allowed for filing motions, replies, etc., shall begin to run from the date of the post office receipt for said letter.

[10] Witnesses.

RULE 24. All costs incident to the attendance of witnesses in proceedings in allotment contest cases shall be paid by the respective parties to the contest by whose request they have been subpœnaed.

Appeals to the Indian Office and the Department.

RULE 25. Appeals from the final order or decision of the Commission lie, in every case, to the Commissioner of Indian Affairs and from his decision to the Secretary of the Interior, and twenty days will be allowed for appeal and argument from date of service of notice of the decision in case of personal service, and thirty days in case of service by registered letter. All appeals and arguments must be served on the opposite party, or his attorney of record, either personally or by registered letter, within the time allowed for appeal, and appellee shall have the same length of time after service of appeal and argument in which to file a reply and to serve the same or a copy thereof on the appellant or his attorney of

record. When an appeal is considered defective the party or his attorney will be notified of the defect and if not amended within fifteen days from the date of service of such notice the appeal may be dismissed by the officer to whom the appeal is taken. [All appeals and arguments, and replies thereto, must be filed with the Commission for transmission to the officer to whom the appeal is taken.]* Notice of all decisions must be served upon the attorney of record, and time will begin to run from such notice.

Ruled out portion of Rule 25 amended, under Departmental instructions of November 7, 1905, as follows:

All appeals, and arguments in connection therewith, and replies thereto, must be filed in the office wherein the decision to be affected by such appeal was made, or in the office of the Commissioner to the Five Civilized Tribes for transmission to the office to which the appeal is taken.

Motions for Rehearings and Reviews.

[RULE 26. Motions for rehearing, or for review of decisions of the Indian Office, or of the Department, and replies thereto, must be served, and filed with the Commission, as provided in Rule 20.]* Rule 26 amended under Departmental instructions of November 7, 1905, as follows:

RULE 26. Motions for rehearing, or for review of decisions of the Indian Office or of the Department, and replies thereto, must be served as provided in Rule 20, and filed within the time provided in that rule, in the office wherein the decision to be affected by the motion was made, or in the office of the Commissioner to the Five Civilized Tribes for transmission to the officer to whom the motion is addressed.

[11]

EXHIBIT C.

(Copy.)

Department of the Interior,
Washington.

Office of Indian Affairs.

Received May 12, 1909.

WILLIAM J. TWIST, Contestant,
vs.
EVA WATERS, a Minor, Contestee;
also
HERMAN KNIGHT, Contestant,
vs.
EVA WATERS, Contestee.

The Commissioner of Indian Affairs.

SIR: The land involved in these cases is fifty acres of valuable oil land situate near Tulsa, Oklahoma. It is being drained and wasted by nearby wells on adjoining lands. Eva Waters is a minor child, born between the 1st day of September, 1902, and the 4th day of March, 1906. Through her father and mother she made application to the Department for an allotment of the entire fifty acre tract to her. Her application was contested by Twist, he claiming adverse to her the west twenty acres of the said fifty acres. Her application was also contested by Herman Knight, he claiming, adverse to her, the other thirty acres. The contestants and contestee are Indians belonging to the Cherokee tribe, each having a small quantum of Indian blood.

The act which went into effect on the 27th day of July, 1908, removed all restrictions from all three of these Indians. Therefore as soon as the land is allotted and patents are issued, the jurisdiction of the Interior Department ceases, and the property, to whomsoever it goes, whether contestants or contestee, is absolutely beyond the control of the Department. The Department retains jurisdiction solely for the purpose of perfecting the allotments and preserving and protecting the land from waste, pending the final determination of the allotment and issuing of patents.

A trial was had in the case of Twist vs. Waters before the Commissioner to the Five Civilized Tribes, and he rendered judgment in favor of Twist. An appeal was taken from his judgment to the Commissioner of Indian Affairs, and his judgment was reversed. The case has been appealed to the Department and is now ripe for determination upon its merits.

No trial has been had in the case of Knight vs. Waters. It is probable that many months would be consumed before a trial could be had of this case upon its merits before the Commissioner
[12] to the Five Civilized Tribes and his decision rendered and an appeal then taken to the Commissioner of Indian Affairs, and an appeal then taken to the Department, which would finally determine the issue in the case. It is uncertain when this case could be determined upon its merits, and in all probability, in view of the value of the land and the great interest that has arisen over the particular land, it would be at least twelve months before the case could be finally determined upon its merits. No person can at this time foresee the outcome of the trial of this suit.

The immediate question to be determined is whether or not this Department will approve a relinquishment, by the minor through her guardian, of her rights in the controversies.

On the 6th day of April, 1909, there was filed wtih the Commissioner to the Five Civilized Tribes, in the case of Twist against Waters, a motion on behalf of Waters to be allowed to confess judgment in favor of Twist. In this motion, C. W. Waters and Maudie Waters, the father and mother of the minor child, acting as guardians of the minor, proposed that she be permitted to retire from the case upon payment for her use of the sum of $4,800.

On the same day, to wit:—April 6th, 1909, in the case of Knight against Waters, a motion was filed by the minor, through C. W. Waters and Maudie Waters, father and mother and guardian of the minor, to be permitted to confess judgment in favor of Knight upon payment for her use of the sum of $7,200.

The Commissioner to the Five Civilized Tribes recommends that the proposed compromise be approved and that the girl receive the $12,000 and relinquish her claim to the entire fifty acres of land, provided no better offer can be obtained.

The merits of the controversy between the two contestants and the contestee have not been presented in this hearing for determination. Indeed, the case of Knight vs. Waters could not at this time be presented.

Mr A. W. Clapp, an attorney of Muskogee, appeared a few

days ago, representing the guardian of the minor, and contended that the offer of $12,000 should be accepted.

Mr. A. R. Serven, of the firm of McGowan, Serven and Mohun, appeared at the same time, claiming to represent the legal guardian of the minor, and contended that a better settlement than $12,000 could be secured for the minor. At the time of hearing the Department was, and now is, of the opinion that the offer of $12,000 should not be accepted, and so announced to the two attorneys, and to other attorneys who represented the interests of oil men in and around Tulsa.

Since the hearing, the Little Rock Oil Company, P. J. White, Thomas White and W. J. Lewis, through their attorney, J. W. Zevely, have offered to pay the minor $25,000 for a relinquishment of her claim and an award of the land to the respective contestants.

Since the hearing Mr. Serven has secured on behalf of the legal guardian of the minor an offer from the Olympus Oil Com-
[13] pany, which is embodied in full in a paper filed in the Department on the 8th day of May, 1909.

The questions for the Department to determine now are two (1) Will this minor child be permitted to withdraw? The uncertainty of the outcome of this controversy is so overbearing upon the Department that it concludes that a reasonable compromise of her rights should be accepted. (2) The next question, therefore, to determine is as to which of these two propositions before us should be approved by the Department.

By the first proposition the minor child gets $25,000 in cash. The only condition imposed is that the land should be awarded to the contestants instead of the contestee, and as I understand it the controversy has narrowed itself down to such narrow limits that it is simply a question as to which of the three parties may have the land. If the minor is to be permitted to withdraw, there is no legal objection standing in the way of awarding the thirty acres to Knight and the twenty acres to Twist, and patents be issued to them speedily. As to the second proposition, before it can be made effective it involves the determination of these cases upon their merits, which is, to say the least, an uncertain issue, and in the meantime the land is being wasted and drained.

I have therefore decided to approve the $25,000 proposition, to permit the minor to withdraw her contest, and to award the land to Twist and Knight, respectively.

It seems to me that the Department ought, in so far as it can, to

control and direct the disposition of the $25,000. I am therefore of the opinion that the $25,000 should be paid over to the Secretary of the Interior, as trustee, to be paid by him to a trust company as the guardian of the girl, if a proper one can be found, or if not, to such guardian as will be approved by the Department.

In accepting this offer the Department will insist that the fund shall not be diminished by any charges upon it for attorney fees.

Mr. Zevely's clients will be given up to and including the 15th instant to make the payment of the $25,000.

(Signed) FRANK PIERCE,
First Assistant Secretary.

May 10, 1909.

Endorsed on back as follows:

Land 36515-09.

Department of the Interior,
Office of Indian Affairs,
Washington, D. C.,
May 12, 1909.

Respectfully Referred to the Commissioner to the Five Civilized Tribes for appropriate action.

(Signed) JOHN FRANCIS, JR.,
Acting Chief Land Division.

Rule to Show Cause.

[14]

Filed July 16, 1909.

In the Supreme Court of the District of Columbia.

No. 51808. At Law.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

Upon consideration of the petition filed herein, it is this 16th day of July, 1909, ordered that the Respondent show cause on or before the 23rd day of July, 1909, why the writ of mandamus should not issue as prayed in said petition; *Provided*, a copy of this order is served on him within five days before said date.

JOB BARNARD,
Associate Justice.

Marshal's Return.

Served copy of the within rule to show cause on Richard A. Ballinger, Secretary of the Department of the Interior, by service on Frank Pierce, acting secretary.

July 16, 1909.

AULICK PALMER, *Marshal.*
S

Motion to Dismiss.

Filed July 19, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA *on the Relation of* HERMAN KNIGHT, Plaintiff,

v.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

Now comes here the defendant, Richard A. Ballinger, Secretary of the Interior, and appearing specially for the purposes of this

motion, and none other, and moves the court to dismiss the petition heretofore filed in the above-entitled cause for the following reasons:

[15] I. Because the said petition or application is not verified by the affidavit of the applicant, as required by law.

II. For other defects apparent on the face of the petition.

OSCAR LAWLER,
Assistant Attorney General.
F. W. CLEMENTS,
Assistant Attorney,
Attorneys for the Defendant.

Messrs. Zevely, Givens & Smith, Attorneys for Plaintiff.

SIRS: Please take notice that the foregoing motion will be set down for hearing before Mr. Justice Wright, on Friday, the 23rd day of July, 1909, at 10 o'clock, a. m., or as soon thereafter as counsel can be heard.

OSCAR LAWLER,
Assistant Attorney General;
F. W. CLEMENTS,
Assistant Att'y,
Attorneys for Defendant.

Service of copy of foregoing motion and notice accepted this 19th day of July, 1909.

ZEVELY, GIVENS & SMITH,
Attorneys for Plaintiff.

Answer.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Frank Pierce, First Assistant Secretary of the Interior, and, in pursuance of law, acting as Secretary thereof in the absence of Richard A. Ballinger, Secretary of the Interior, while especially reserving to himself all benefit to any exception to the uncertainties and defects of the petition filed herein, and to the lack of jurisdiction in this court to grant a writ of mandamus compelling the performance by him of duties involving the exercise of judgment and discretion (such being the character of the act performance of which is sought by this proceeding), nevertheless to make answer to said petition, says:

1-5. He admits the allegations in the first five paragraphs of said petition.

6. He admits that a contest was instituted by relator in
[16] the office of the Commissioner to the Five Civilized Tribes, but he denies that any hearing thereon was had or testimony taken therein until long after May 10, 1909, or that any appeal, at that time or since, was taken, or that under the alleged rules of practice, the contest ever has been taken by appeal to the Commissioner of Indian Affairs, or the Secretary of the Interior. He denies that said, or any proceedings, either on May 1, 1909, or at any other time, or at all, culminated in a decision awarding said land to said relator, but on the contrary, alleges the fact to be that on May 10, 1909, said respondent announced that, in consideration of the facts then before him as such Acting Secretary of the Interior, he would, in due course of administration of the affairs of his office, in the absence of any facts which might thereafter develop to change said determination, award to said relator the right to select said lands under the provisions of the

act of Congress of July 1, 1902. He admits that, on said May 10, 1909, he considered a question then and there presented, viz., whether or not he should permit the said Eva Waters to accept from the relator a large sum of money in consideration whereof she was to be permitted to withdraw from said contest.

7. He denies that, as in form alleged in the seventh paragraph of said petition, he directed the chief of the Cherokee Nation to execute a deed to the land in controversy to said relator and to forward the same to him for approval and delivery, and avers that what he did in this behalf is shown by his telegram, sent May 11, 1909, to the Acting Commissioner to the Five Civilized Tribes, a correct copy of which is as follows:

Ryan, Acting Commissioner, Muskogee, Oklahoma:

Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight, respectively, upon payment of twenty-five thousand dollars for use of minor Waters. Contestant given including fifteenth to make payment. Upon receipt of thirteen thousand more within time allowed forward entire twenty-five thousand to Department endorsed to Secretary. When entire fund received by you prepare deeds to respective contestants and have them executed and forwarded here for approval. Report progress by wire.

FRANK PIERCE,
First Assistant Secretary.
F. P.

O. B. chg.
G. R.

8. He admits, as averred in the eighth paragraph of said petition, that the Principal Chief of the Cherokee Nation did sign and execute a deed of the land in controversy to the relator, and that the same was forwarded to the Department of the Interior; but he denies that he has ever approved said deed, and avers that without his approval said deed is insufficient to pass any title to the land in controversy either out of the Cherokee Nation as such or of the reversionary interest of the United States in said
[17] land. He further denies that relator complied with all the requirements imposed on him by law, and avers that long prior to said May 10, 1909, relator had disposed of all his alleged interest in the land in controversy to a non-citizen of the Cherokee Nation, by a deed, as will hereinafter be more fully set forth, and

that in consequence thereof relator, on said May 10, 1909, and at the time of filing this petition for the writ of mandamus, had no interest in the land in controversy, and was not entitled to the allotment thereof. And he further avers that he was unaware of the circumstances of this transfer of relator's interest on and for a long time after said May 10, 1909.

9. As to the allegations contained in the ninth paragraph, he admits that he refuses to deliver said deed to the relator "properly recorded as provided by law," but denies that the execution of the deed by the Principal Chief of the Cherokee Nation conveyed the title to the land in controversy to the relator; denies that he approved said deed either in conformity to the provisions of the act of Congress of July 1, 1902, or in any manner at all approved the same; denies that as in form alleged he directed the Principal Chief to execute said deed; and denies that no discretionary power was left in him relative to said transaction, all of which will be more fully hereinafter shown and set forth.

10. He denies that relator is entitled to have said deed delivered to him.

11. He further denies that it is his duty to deliver said deed to the relator.

12. As to the allegation in the twelfth paragraph of said petition, he is advised that the same presents merely a conclusion of law, which he need not answer.

13. As to the allegations in the thirteenth paragraph of said petition, respondent states that the facts are as follows: Upon announcing his permission that the contestee, Eva Waters, might withdraw from the contest, he did state that, when relator had made full payment of the stipulated sum, he might then enter into possession, and that he, respondent, would direct issuance of patent or deed for the land in controversy; and he avers that he was moved to such action by reason of representations made to him by relator's counsel that the lands in controversy were being rapidly drained of their oil deposits by operations on contiguous tracts; but he denies that he authorized relator's alleged tenant to proceed with development for the purposes of prospecting for and producing oil and natural gas from said lands. And as to the averment that said tenant has gone upon said lands and has laid out and expended large sums of money thereon, respondent says that he is without information other than in said petition contained and cannot answer, on belief or otherwise, whether said statement is true or otherwise. But he does aver that under the rules of

practice obtaining in the Department of the Interior, in Indian affairs, thirty days are allowed from and after notice of a decision within which time to file a motion for review thereof, and [18] that on May 21, 1909, in the presence of counsel representing the said Eva Waters and the said Herman Knight and Wm. J. Twist, he announced to said counsel that the said Eva Waters should have up to and including the 9th day of June, 1909, within which to file a motion for review of said order of May 10, 1909, and that counsel for said Eva Waters then and there gave notice that he would file and present such motion. If, in view of these premises, relator or any alleged tenant of his went on the land and did those things he alleges were done, he or they did so with knowledge that said order had not become final and at their peril.

14. He admits he has refused and still refuses to deliver said so-called deed to relator and as such Acting Secretary of the Interior he did order other and further proceedings relative to the subject matter hereof, as will more fully appear in his further answer; and this without any misconception of the force and effect to the so-called execution of said deed, which, as averred aforesaid, was not and never has been approved by your respondent. He denies that no other than a purely ministerial duty remained in him, after May 10, 1909, touching these premises, but, on the contrary, avers that his duties respecting the matters in controversy and said allotment of land are purely judicial, involving the exercise of official judgment and discretion, and, as such, are not controllable by the courts in mandamus proceedings.

Furthermore, and more fully answering the rule herein issued, to show cause why the writ of mandamus should not issue as prayed, he avers:

That the merits of the contest, i. e., whether relator (the contestant) or Eva Waters (the contestee) had the greater right to allotment of the land in controversy, were not considered in making the disposition of the case on May 10, 1909, aforesaid; that it was then represented to him that the said Eva Waters, through her guardian, desired to withdraw from said contest in view of the large sum of money offered for such withdrawal; that relator's counsel represented that the consideration offered was amply commensurate with the extent of her potential interest in said land; and that moved by such considerations he deemed that said Eva Waters' interests would be subserved by allowing such withdrawal. But immediately thereafter, respondent avers that he was advised

by telegram from the parent and guardian of said Eva Waters that the latter protested against allowance of said withdrawal, the same having been induced by gross misrepresentations of the value of the land in controversy; that thereafter a motion to review the action of May 10, 1909, was in due course presented by said Eva Waters, through her attorneys; that counsel for relator then and there appeared generally for the relator, and neither raised nor advanced any objection as to your respondent's complete jurisdiction in the premises, or to his proceeding to entertain and give consideration to said motion for review; that by brief and argument said relator, by his counsel, appeared in opposition to the contentions, mainly as to the facts, made in behalf of said Eva Waters, and sought, not by plea or objection to the authority or jurisdiction of [19] respondent, but upon the merits, to induce denial of the said motion to review and reconsider the action of May 10, 1909; that thereafter, and on June 24, 1909, the respondent being satisfied that the consideration offered for said withdrawal was inadequate, and that he had been misled in adjudging what the best interests of this Indian ward, said Eva Waters, required, he vacated said order of May 10, 1909, and thereafter directed that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered and disposed of on its merits, and thereafter directed that the money deposited on behalf of relator should be returned to the party depositing it. And he also avers that at no time did relator question his jurisdiction, but, on the contrary, submitted thereto. He avers that pursuant to his said order, the contest case wherein relator is contestant and said Eva Waters is contestee was duly proceeded with before said Commissioner to the Five Civilized Tribes and has not yet reached him for consideration in the due course prescribed by the rules of practice in such cases obtaining.

He avers that, under existing law, the Commissioner to the Five Civilized Tribes, under the direction of the Secretary of the Interior, is vested with exclusive jurisdiction to determine all matters relative to the allotment of lands in the Cherokee Nation, and that his duties thereunder are strictly judicial, and are not subject to control by a court of law in mandamus proceedings.

He further avers that, under the law relating to the allotment of lands in the Cherokee Nation, the Commissioner to the Five Civilized Tribes is directed to issue allotment certificates as evidence of the right of an allottee to the land selected as his allotment as a step preliminary to the issuance of a deed or patent

thereto, and that no such certificate of allotment has ever been issued to said relator.

He further alleges that the Cherokee Agreement (act of July 1, 1902 (32 Stat., 716), provides (Sec. 59) that:

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in this patent.

He avers that under existing law no deed or patent is valid or sufficient to pass title until approved by him and recorded in the office of the Commissioner to the Five Civilized Tribes (Sec. 5, act of April 26, 1906), and that until title passes he has exclusive jurisdiction and control of all matters pertaining to such allotments; that his approval of such deed or patent is not a ministerial duty, but a duty requiring the exercise of judgment and discretion, involving a judicial determination of the rights of the applicant for patent to the lands involved; and that pursuant to his duty and his right, he has refused to approve a deed of the lands herein in controversy to the said relator, because, while acting within his jurisdiction, he has determined that, under the law governing allotments in the Cherokee Nation, said relator has not yet shown
[20] himself, by a trial of the contest case instituted by him against said Eva Waters, to be entitled to take said land in allotment.

And he further says that his action of May 10, 1909, in so far as it affects relator was in part induced by a concealment of material facts bearing upon relator's right, in any event, whether said Eva Waters did or did not withdraw from said contest, to take as his allotment the land in controversy. He avers that said relator, on or about April 15, 1909, for a consideration sold and disposed of all his alleged right, title, and interest in said land, to one C. C. Robert, who, he is informed and believes and therefore avers, is not a citizen of the Cherokee Nation or entitled to take an allotment of land therein. He is also informed and believes and therefore avers that said relator resides in Texas and that said contest for said allotment of land, as well as these proceedings for a writ of mandamus, have been and are maintained and prosecuted, not for the benefit of the nominal relator, but for others who are not entitled to an allotment in the tribal lands of the Cherokee Nation; and he suggests to the court that the name of Herman Knight, the nominal relator or applicant for this writ of mandamus, is not subscribed to said petition; that it nowhere appears, save by verifi-

cation of said petition by one Thomas White, that the latter is, as asserted, the attorney in fact, duly authorized under a power of attorney from said Knight to sign said Knight's name to said petition or, in his behalf, to make this application for the writ of mandamus; and he further suggests that were such power of attorney forthcoming and in proper form produced, said verification of said petition by said Thomas White is not such verification required by the law in such case made and provided.

Wherefore, for the reasons and on account of the facts set forth in this return, it is respectfully submitted to the Court that this court is without jurisdiction in this proceeding for mandamus to consider the application of the relator or by mandate to control the discretionary action of your respondent.

And, having fully answered and made return to the rule to show cause, he prays that said rule be dismissed, with his reasonable costs and that he be discharged from further duty in answering thereunto.

OSCAR LAWLER,
Assistant Attorney General.
F. W. CLEMENTS,
1st Ass't Att'y.

FRANK PIERCE,
Acting Sec't'y of the Interior.

DISTRICT OF COLUMBIA,
City of Washington, ss.:

Frank Pierce, being first duly sworn, says that he is Acting Secretary of the Interior; that he has read over the foregoing answer by him subscribed, and knows the contents thereof; that the matters and things therein set out on his personal knowledge, he
[21] knows to be true, and those set out on information and belief, he believes to be true.

FRANK PIERCE.

Subscribed and sworn to this 22nd day of July, 1909, before me.

EDWD. B. FOX,
[SEAL.] *Notary Public, D. C.*

Service above acknowledged this day.
BRANDENBURG & BRANDENBURG.
ZEVELY, GIVENS & SMITH.

Amended Petition.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia, — Term, 1909.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

To the Honorable Chief Justice and Associate Justices of said Court:

Your relator, Herman Knight, respectfully states as follows:

He is a citizen by blood of the Cherokee Nation and enrolled upon the approved roll of citizens by blood of said Nation as No. 16,760, age 26, as of September 1, 1902; and, as quantum of blood, ¼ Cherokee, as is more fully shown by a certificate from the Commissioner to the Five Civilized Tribes, which certificate is attached hereto, made a part hereof, and marked Exhibit "A."

As such citizen of the Cherokee Nation he is entitled to an allotment of land as provided by the Act of Congress approved July 1, 1902, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for disposition of townsites therein, and for other purposes."

On the 28th day of August, 1907, he made application to the Commissioner to the Five Civilized Tribes at the Cherokee Land Office to take in allotment the N./2 of the S. E./4 of the N. W./4, and the S. W./4 of the S. E./4 of the N. W./4 of Section 19, Township 20 North, Range 13 East, in the Cherokee Nation, now in the State of Oklahoma, and it appeared of record in the office of said Commissioner to the Five Civilized Tribes that on the 21st day of August, 1907, the said tract of land above described was selected by Maudie Waters to be taken as a tentative allotment for her minor child, Eva Waters. The right of the class of citizens of the Cherokee Nation to which Eva Waters belongs and the

[22] right of Eva Waters to select an allotment of the lands belonging to the Cherokee Nation, is now the subject of litigation in the United States Court of Claims at Washington, D. C.,

or in the Supreme Court of the United States, and is not yet adjudicated.

Under the rules of practice in Cherokee allotment contest cases before the Commissioner to the Five Civilized Tribes and the Commissioner of Indian Affairs and the Secretary of the Department of the Interior, as approved by the Secretary of the Department of the Interior, it was incumbent upon your relator to proceed in the matter of the selection of his allotment as he did proceed as hereinafter set forth. A copy of said rules of practice is attached hereto, made a part hereof, and marked Exhibit "B."

When, on the 28th day of August, 1907, your relator appeared at the office of the Commissioner to the Five Civilized Tribes for the purpose of selecting the above described land as a portion of his allotment, he ascertained that the said described lands had been previously tentatively set aside for Eva Waters, and your relator then and there filed a contest against the said tentative selection.

Under the said rules of practice the said contest instituted in the office of the Commissioner to the Five Civilized Tribes was proceeded with, there, and on appeal before the Commissioner of Indian Affairs, and thereafter, on appeal from the Commissioner of Indian Affairs to the Secretary of the Interior. These various proceedings had touching the said contest culminated in a decision by the Secretary of the Department of the Interior on May 10, 1909, awarding the land above described to your relator, as may be seen by the decision rendered by said Secretary of the Department of the Interior on said day, a copy of which decision is hereto attached and marked Exhibit "C."

On May 11, 1909, the Secretary of the Department of the Interior directed the Chief of the Cherokee Nation, whose duty it was under the Act of Congress approved July, 1902, to execute deeds, to execute a deed to the above described land to Herman Knight and forward the same to said Secretary of the Department of the Interior for approval and delivery, as is more fully shown by a telegram in words and figures as follows, to wit:

"29 Ks HI C 89 Collect Govt.

Dn—WASHINGTON, D. C., *May 11th*, 1909.

Ryan, Acting Com'r, Muskogee, Oklahoma:

Lands in twist and knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty five thousand dollars for use of Miner Waters contestants given in-

cluding fifteenth to make payment upon receipt of thirteen thousand more within time allowed forward entire twenty five thousand to department endorsed to Secretary when entire fund received by you. Prepare deeds to respective contestants and have them executed and forwarded here for approval report promised by wire.

FRANK PIERCE,
First Ass't Sec'y.

1135 A. M."

[23] Thereafter, and in response to the telegram above quoted the Commissioner to the Five Civilized Tribes advised the Secretary of the Department of the Interior of the due compliance by the relator with the terms of his said telegram and forwarded to the Secretary of the Department of the Interior a deed properly executed by the Chief of the Cherokee Nation conveying to your relator the lands above described. Said deed has been approved by the Secretary of the Interior. The relator complied with all of the requirements imposed upon him by law. The land here involved is of more than $10,000 in value.

Notwithstanding the due execution by the Principal Chief of the Cherokee Nation of the deed aforesaid conveying the title to the lands aforesaid to your relator, and notwithstanding the due approval by the Secretary of the Department of the Interior of said deed in conformity to the provisions of the Act of Congress of July 1, 1902; and, notwithstanding the fact that the Secretary of the Department of the Interior directed the Principal Chief of the Cherokee Nation to execute this particular deed; and, notwithstanding there is no discretionary power left in the Secretary of the Department of the Interior relative to said transaction, he refuses to deliver said deed to your relator properly recorded as provided by law.

Your relator is entitled to have the said deed delivered to him as aforesaid.

It is the duty of the Secretary of the Department of the Interior to so deliver said deed to this relator.

This relator has no other remedy than by mandamus.

After your relator had performed all of the acts necessary and prescribed by law and prescribed by the rules and regulations of the Interior Department touching the selecting of lands in allotment in the Cherokee Nation, and after the 11th day of May, 1909, the Secretary of the Interior authorized and empowered your relator to have his tenant proceed with the development of said

above described premises for the purpose of prospecting for and producing oil and natural gas from the said lands. In accordance with the said authority your relator has procured his said tenant to go upon said lands and said tenant is now upon said lands and has already laid out and expended large sums of money in prosecuting an effort to produce oil and natural gas from underneath the said premises.

Your relator further states as follows: The Secretary of the Department of the Interior has refused and still refuses to deliver the deed to your relator and has ordered other and further proceedings in the Department of the Interior relating to this subject matter, and has misconceived the force and effect of the execution and approval of said deed. While it clearly appears that there remains in the Department of the Interior, and that there is left to the Secretary of the Department of the Interior no other or further duty touching this subject matter, save and except the purely ministerial duty of delivering the said deed to your relator, the said Secretary of the Department of the Interior asserts the right to refuse to deliver said deed to your relator upon the
[24] ground, as your relator is informed and believes from official notices received from the Secretary of the Department of the Interior, that he, the said Secretary, still has supervision and control over the lands conveyed by the said deed, and claims to have the right to yet allot said lands.

Wherefore your relator prays the granting of a writ of mandamus under the seal of this court directed to the said Secretary of the Department of the Interior, commanding him forthwith to deliver to your relator the said deed properly recorded as required by law in such cases, and to do and perform all such other acts and things in the premises as the law may require. And your relator asks all such other and further relief as may be right and just, and as in duty bound your relator will ever pray.

HERMAN KNIGHT.

BRANDENBURG & BRANDENBURG &
ZEVELY, GIVENS & SMITH, *Att'ys for Compl.*

STATE OF INDIANA,
Marion Co., ss.:

Herman Knight, of lawful age, being first duly sworn according to law on his oath states: that he is the relator in the above petition for a writ of mandamus and that he knows the contents of said

petition; and he states that the matters and things therein alleged are true in substance and in fact, save such things as are alleged upon information and belief he believes them to be true; and that he has signed the same as his free act and deed.

HERMAN KNIGHT.

Subscribed and sworn to before me this 21 day of July, 1909.

LEW CAMPBELL,

[SEAL.] *Notary Public.*

My commission expires March 11, 1917.

(Endorsed:) File. W.

Stipulation as to Answer.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

HERMAN KNIGHT, Pl'ffs,
vs.
BALLINGER, Sec'y Int., Def't.

It is hereby stipulated & agreed that the Answer as filed by the Def't herein may stand as an Answer to the Amended Complaint.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH, *For Pl'ff.*
OSCAR LAWLER, *For Respondent.*

Stipulation as to Exhibits.

25]

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

No. 51808. At Law.

U. S. ex Rel. KNIGHT, Petitioner,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, Respondent.

It is hereby stipulated and agreed that the Exhibits filed herein with the original petition and made a part thereof, shall be deemed and considered to be a part of the Amended Petition filed herein this 23d day of July, 1909.

BRANDENBURG & BRANDENBURG &
ZEVELY, GIVENS & SMITH, *Att'ys for Pl'ff.*
OSCAR LAWLER,
Assistant Attorney General,
Att'y for Respondent.

Replication.

Filed July 28, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

For reply to the answer of respondent herein, relator states as follows:

Replying to paragraph six of said answer, relator states the fact to be that the Secretary of the Interior did, on May 10, 1909, award the land in controversy to Herman Knight and did, on May 10, 1909, permit and authorize Eva Waters to accept, and he, the said

Secretary of the Interior, did accept from the relator a large sum of money in consideration whereof she was permitted to withdraw from said contest. Relator further avers that on subsequent dates to May 10, 1909, the Secretary of the Interior did confirm and approve the said decision of May 10, 1909.

Replying to paragraph seven of said answer, relator states the fact to be that the telegram as quoted in the answer of respondent erroneously uses the word "progress" in the last line of said
[26] telegram before the signature; and said telegram should read: "promptly," instead of "progress."

Replying to that part of paragraph eight of said answer which avers that the relator herein, long prior to May 10, 1909, had disposed of all his alleged interest in the land in controversy to a non-citizen of the Cherokee Nation by a deed, relator denies that he had on said May 10, 1909, or at any time prior thereto, parted with his right to claim the same in allotment and states the fact to be that he now has, as he has always had, the right as a citizen of the Cherokee Nation, to claim said land as an allotment.

Further replying to said paragraph eight, relator states that he has not sufficient information to state as to whether or not respondent was, as he avers, unaware on May 10, 1909, of the alleged transfer by the relator of his interest in said lands.

Replying to paragraph nine of respondent's answer relator states that said paragraph nine is merely a conclusion of law.

Replying to paragraph thirteen of respondent's answer, relator states the fact to be that, at the time of the decision rendered by said Secretary of the Interior, relator was in lawful possession of the lands in controversy; that the Secretary of the Interior having fixed the price at which the minor Eva Waters would be permitted to withdraw and the lands patented to Herman Knight, authorized Herman Knight to proceed through his tenants with the prosecution of developments for oil and natural gas without waiting for the physical delivery to the said relator of a deed or patent to the land,—the only condition which he had to observe to authorize him to proceed with this development being the payment in full of the sum demanded by the Secretary of the Interior, to wit: the sum of fifteen thousand dollars; that your relator paid said sum to the Secretary of the Interior for the benefit of said minor Eva Waters, and on May 13, 1909, your relator complied with said condition and immediately erected on said land derricks and other machinery necessary to the drilling for oil and natural gas, and said derricks and machinery were on said land and the work was being prosecuted prior to and on May 24, 1909.

Replying to paragraph fourteen of respondent's answer, relator states the fact to be that the Secretary of the Interior, to-wit: Frank Pierce, acting as Secretary of the Interior, as by law he was authorized to do, after due investigation, demanded of relator to pay into his hands for the benefit of Eva Waters a minor the sum of fifteen thousand dollars; that upon the payment of said sum he directed the Principal Chief of the Cherokee Nation to issue to said relator a patent or deed to the lands in controversy. Herman Knight complied with the condition and the Principal Chief executed the deed. Relator states that no discretionary act remains to the Secretary of the Interior and only the purely ministerial one of delivering the deed or patent to the relator.

Further answering paragraph fourteen of respondent's answer, relator admits that the question as to whether or not relator or Eva Waters the minor contestee had the greater right to the allotment of the lands in controversy was not decided on its [27] merits and avers the fact to be that the disposition of the case made by the Secretary of the Interior on May 10, 1909, was in consequence of an investigation made by the Secretary of the Interior himself by means of which he arrived at a determination as to the value of the premises involved. Relator further avers the fact to be that the respondent was not moved to the action taken by him in this regard upon any representation made by counsel for relator but was moved solely and entirely to the action taken by him by investigations conducted upon his own account. Relator states the fact to be that he offered to pay for the benefit of said Eva Waters a minor the sum of seventy-two hundred dollars to procure her to withdraw her application to allot said lands and to permit your relator to allot them and that counsel for relator represented to the Secretary of the Interior, fully believing said representations to be true, that said sum of seventy-two hundred dollars was entirely adequate to warrant him in permitting the said Eva Waters to withdraw her application to allot said land; that the said Secretary of the Interior, not content with these representations, not satisfied with the sum tendered,—for himself investigated the proposition and after a full hearing, both by brief and oral argument, by testimony of experts offered by your relator, by the statements of government officials who examined the property, by reason of the Secretary's own investigation of the physical fact—having himself been on the premises in controversy—he decided that the sum offered was inadequate and demanded of your relator that he pay him the sum of fifteen thousand dollars in consideration of which he would permit the said

Eva Waters to withdraw her filing and would issue to your relator a deed or patent to said land, and urged your relator to pay the same.

Further replying to paragraph fourteen, relator denies that any misrepresentations of any character were made to the parent and guardian of Eva Waters as to the value of the land in controversy.

Further replying to said paragraph fourteen, relator denies that the action sought to be taken by the Secretary of the Interior on June 24, 1909, looking to vacating the order of May 10, 1909, was taken in consequence of his having been misled by your relator or his counsel; but on the contrary avers the fact to be that the price which your relator paid for the benefit of said Eva Waters was made in consequence of the investigation made by the Secretary of the Interior himself; and further avers the fact to be that the consideration paid was entirely adequate and for the best interests of the minor, said Eva Waters.

Further replying to said paragraph fourteen, your relator states the fact to be that the money deposited on behalf of relator has not been returned to him; and as to whether or not the respondent directed the same to be returned to him, your relator is not sufficiently informed either to affirm or deny.

Further replying to said paragraph fourteen of respondent's answer, relator denies that he has not questioned the jurisdiction of respondent to proceed further with said investigation, and avers the fact to be that by telegram of date July 12, 1909, he
[28] advised the respondent of his purpose to file this suit in mandamus in this court on July 16, 1909. He further avers the fact to be that when said contest case of Herman Knight against Eva Waters was called for trial at Muskogee on the 16th day of July, 1909, that then and there by his counsel he protested against any further steps being taken touching said land, stating as the grounds of said protest that the land had already been patented to your relator and that the jurisdiction of the Department of the Interior touching said land had ceased.

Further replying to said paragraph fourteen of respondent's answer, relator states that while under the law certificates of allotment may be issued to applicants for allotment of lands in the Cherokee Nation, he avers it to be the fact that the issuance of a certificate of allotment is not an essential and prerequisite step to the issuance of a patent.

Further replying to paragraph fourteen of respondent's answer, relator states that under the law governing allotments in the Cherokee Nation it is not necessary that a contest case once in-

stituted should be tried to a final conclusion to entitle the applicant to have the lands in allotment, but that various forms of procedure obtain before the Commissioner of the Five Civilized Tribes and the Secretary of the Interior by means of which allotments may be selected and patents thereto issued; that your relator has, by the action of the Secretary of the Interior directing the Principal Chief to issue patent to him, become entitled and is entitled to have the same delivered.

Further answering said paragraph fourteen of respondent's answer, relator denies that the action of respondent taken May 10, 1909, was in many manner or in part induced by the concealment of any material facts bearing upon relator's right; he denies that on or about April 15, 1909, or at any time, for a consideration he sold and disposed of all his "alleged" right, title and interest in said land to one C. C. Robert or to any other person. Under the law he could not dispose of said land; and if any purported conveyance was made on April 15, 1909, it was not intended to be a conveyance in fee, but was merely intended to be and sought to be a mortgage; that since said date the said Robert has reconveyed to relator all interest or purported interest which your relator sought by said conveyance of April 15, 1909, to convey to him.

Further answering said paragraph fourteen of respondent's answer, your relator states that it is immaterial where his citizenship may now be as affecting his right to take lands of the Cherokee Nation in allotment, and denies that he is a citizen of the State of Texas, and avers the fact to be that he is a citizen of the State of Oklahoma. He avers that his contest seeking to allot the land in controversy, as well as these proceedings for a writ of mandamus, have been and are maintained and prosecuted for his own benefit.

Relator further avers that the law requiring the Secretary of the Interior to approve patents in order to divest the United States Government of its reversionary interest does not prescribe
[29] the manner in which the formal approval shall be executed by the Secretary of the Interior.

Having fully replied to the answer of respondent herein, your relator respectfully prays that a peremptory writ of mandamus be issued against the said respondent requiring him to deliver to your relator a deed to said land, properly recorded, and for such other and further relief as to the Court may seem just, and for his reasonable costs.

BRANDENBURG & BRANDENBURG &
ZEVELY, GIVENS & SMITH,
Att'ys for Relator.

Joinder of Issue.

Filed July 30, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

The respondent joins issue upon the replication of the relator, Herman Knight, to respondent's answer to the rule to show cause.

OSCAR LAWLER,
Ass't Att'y Gen'l,
F. W. CLEMENTS,
Attorneys for Respondent.

Service acknowledged July 30, 1909.
BRANDEBURG & BRANDENBURG,
Att'ys for Relator.

Notice of Hearing.

Filed July 30, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

To Brandenburg & Brandenburg, E. R. Perry, and Zevely, Givens & Smith, Attorneys for Relator:

Please take notice that on August 3, 1909, at 10 o'clock in the morning, we shall ask the court that the issues joined in the
[30] above-entitled cause may be set for trial at an early date.

OSCAR LAWLER,
Ass't Att'y Gen'l,
F. W. CLEMENTS,
Attorneys for Respondent.

Service accepted July 30, 1909.
BRANDENBURG & BRANDENBURG,
Att'ys for Pet.

Supreme Court of the District of Columbia.

TUESDAY, *August 3d*, 1909.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice, presiding.

* * * * * * * * *

No. 51808. At Law.

U. S. ex Rel. HERMAN KNIGHT, Petitioner,
vs.
R. A. BALLINGER, Sec'y, Respondent.

On motion of attorney for respondent, and for good cause shown, this cause is hereby set for hearing on the 2nd day of September, 1909.

Supplemental Answer.

Filed September 1, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now Frank Pierce as First Assistant Secretary of the Interior, and, in pursuance of law, acting as Secretary thereof in the

absence of Richard A. Ballinger, Secretary of the Interior, and here reiterating, reaffirming and reasserting all, each and every of the matters and things set forth in his answer heretofore filed in the above entitled matter by way of supplemental answer, said petition alleges:

That heretofore and on the 19th day of July, 1909, the matter of the contest then pending before the Commissioner to the Five Civilized Tribes to determine the right as between the relator above named and said Eva Waters to the land described in the [31] petition herein came on regularly to be heard, the said relator having theretofore regularly appeared and been represented by counsel in said contest, and thereupon, and after the hearing of proofs and evidence in reference to the respective matters and issues raised in said contest, the Commissioner to the Five Civilized Tribes did duly and regularly, and in all respects in manner and form in accordance with law, decide said contest and the issues therein against the said relator and in favor of the said Eva Waters, and awarded said lands involved in said contest and described in said petition to the latter, and denied any right in the said relator thereto.

That under and in accordance with the rules and regulations of the said Department of the Interior, and pursuant to the regular practice in that behalf, said relator was allowed thirty days within which to appeal from the said decision of said Commissioner to the Five Civilized Tribes, but that said relator failed and refused to take any such appeal, or any proceedings to have reviewed the decision of the said Commissioner to the Five Civilized Tribes aforesaid, and said decision thereby, and upon the 18th day of August, 1909, became final and conclusive.

That thereafter, and on the 27th day of August, 1909, and in the ordinary course of its duty in the premises, said Department of the Interior, through the office of the Commissioner of Indian Affairs, delivered to the lawful guardian of the said Eva Waters, deed, duly executed by the persons and in the manner required by law, and duly approved by the said Secretary of the Interior, conveying unto the said Eva Waters full and complete title in and to the real property described in the petition in the above entitled matter, and that said Eva Waters, minor as aforesaid, is now, and ever since the approval and delivery of said deed has been, the absolute and unqualified owner of said real property.

That by reason and on account of the execution and delivery of said deed as hereinabove set forth, the said Department of the

Interior has not nor has any officer thereof, any power, authority, or jurisdiction over the land above described, nor has said Department of the Interior, or any officer thereof, any duty, right, or authority to execute or deliver, or cause to be executed or delivered, any conveyance covering the said property to the relator herein or to any other person.

Wherefore, respondent prays that he be hence dismissed and for his costs.

FRANK PIERCE,
Acting Secretary of the Interior.

OSCAR LAWLER,
Assistant Attorney General,
Attorney for Respondent.
F. W. CLEMENTS,
1st Ass't Att'y.

[32] DISTRICT OF COLUMBIA,
City of Washington, ss.:

Frank Pierce, being first duly sworn, says that he is Acting Secretary of the Interior; that he has read over the foregoing supplemental answer by him subscribed and knows the contents thereof; that the matters and things therein set forth on his personal knowledge he knows to be true, and those set forth on information and belief, he believes to be true.

FRANK PIERCE.

Subscribed and sworn to this first day of September, 1909, before me.

W. BERTRAND ACKER,
[SEAL.] *Notary Public in and for*
the District of Columbia.

[99] *Motion to Dismiss.*

Filed October 6, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT

v.

RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now the respondent in the above-entitled action and moves the court to dismiss the petition heretofore filed in said cause for the following reasons:

1. Because, by reason of those matters set forth in respondent's supplementary answer filed, according to the requirements of law and rules of practice, in said action, on September 1, 1909, to wit, that title to the land in controversy has already passed to other parties, and is beyond the jurisdiction of your respondent to control, the subject matter of relator's complaint and the issues presented by the pleadings herein, present purely a moot question.

2. Because the relator has failed diligently to prosecute this action in that to the matters aforesaid, set forth in respondent's supplementary answer aforesaid, said relator has neither joined issue by replication nor has demurred thereto, nor has in any respect answered the exigencies of said supplementary answer.

OSCAR LAWLER,
Assistant Attorney-General;
F. W. CLEMENTS,
First Assistant Attorney;
C. EDW. WRIGHT,
Assistant Attorney,
Att'ys for Respondent.

To Brandenberg & Brandenberg, Attorneys for Relator.

SIR: Please take notice that the foregoing motion will be set down for hearing before Mr. Chief Justice Clabaugh on Friday,

the 8 day of October, 1909, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard.

OSCAR LAWLER,
F. W. CLEMENTS,
C. EDW. WRIGHT,
Attorneys for the Respondent.

Service of copy of the foregoing motion and notice accepted this 5 day of October, 1909.

BRANDENBURG & BRANDENBURG,
Per O., *Attorneys for Relator.*

[100] *Motion to Strike Supplemental Answer and Notice of Hearing.*

Filed October 13, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

Mandamus.

Comes now the petitioner herein, the United States of America on the relation of Herman Knight, by its attorneys and moves the Court to strike from the files of this case, the so-called supplemental answer filed herein by the defendant on the 1st day of September, A. D., 1909.

And for cause therefore says:

First. For that the said so-called supplemental answer was filed without leave of Court first had and obtained, after issue had been joined in this cause and testimony taken thereon.

Second. For that by the said so-called supplemental answer, an entirely different issue was raised from that set up in the pleadings upon which issue had been joined and testimony taken.

Third. For that the said so-called supplemental answer presents propositions inconsistent with each other.

ZEVELY, GIVENS & SMITH,
BRANDENBURG & BRANDENBURG,
Attorneys for Relator.

Oscar Lawler, Esq., Attorney for Defendant.

DEAR SIR: Please take notice that we shall call the foregoing motion to the attention of Mr. Chief Justice Clabaugh, holding Circuit Court No. 2, at the hour of 10 o'clock A. M., on the 14th day of October, A. D., 1909.

ZEVELY, GIVENS & SMITH,
BRANDENBURG & BRANDENBURG,
Attorneys for Relator.

[101] Supreme Court of the District of Columbia.

THURSDAY, *October* 14*th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

No. 51808. At Law.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Pl'ff,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior, Def't.

This cause coming on to be heard, Mr. Edwin C. Brandenburg, attorney for plaintiff, moves that Messrs. J. W. Zevely and Edgar Smith of Oklahoma, may be heard on behalf of plaintiff for the purposes of this case, which is by the Court granted.

Whereupon, the motion of petitioner filed herein by his attorneys, October 13th, 1909, to strike from the files "the so-called supplemental answer," filed herein September 1st, 1909, coming on for hearing the respondent by his attorneys moves for leave to file said answer on September 1st, 1909, nunc pro tunc, which is hereby granted, and so ordered.

Thereupon, the petitioner, by his attorneys in open Court, withdraws the aforesaid motion filed October 13th, 1909, and moves for

leave to demur to said supplemental answer forthwith, which is hereby granted, and thereupon said demurrer is filed.

Further, the respondent by his attorneys in open court withdraws his motion filed herein October 6th, 1909, to dismiss the petition herein.

Whereupon, attorneys for the respective parties after argument of this cause upon the demurrer to said supplemental answer, submit the same to the Court for consideration, whereupon it is ordered that said demurrer be, and the same is hereby overruled, with leave to petitioner to plead over as advised within ten days hereof.

Demurrer to Supplemental Answer.

Filed October 14, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Department of Interior.

Mandamus.

Comes now the relator by his attorneys, and demurs to the so-called supplemental answer of the respondent, filed Sep-
[102] tember 1, 1909, to the amended petition in the above entitled cause, and says that the same is bad in substance.

ZEVELY, GIBBONS & SMITH,
BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

NOTE.—Among the points of law to be argued in support of the foregoing demurrer are the following:

1. That the so-called supplemental answer raises an entirely different issue from that set up in the pleadings on which issue had been joined and testimony taken.

2. That the said so-called supplemental answer presents propositions inconsistent with each other.

3. That the facts set up in the so-called supplemental answer that a deed has been issued and delivered to a third party for the prop-

erty involved in this case, since the joinder of issue herein, operates to relieve respondent from any further duty in reference thereto and that therefore the question involved in the petition is a moot one and also a sufficient defense to the relief claimed, does not in law constitute a good defense.

Replication to Supplemental Answer.

Filed October 25, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Department of Interior.

Mandamus.

Comes now the relator, Herman Knight, by his attorneys and without waiving his rights under the demurrer heretofore filed, for replication traverses and denies each and every of the allegations of the so-called supplemental answer filed herein on the 1st day of September, A. D., 1909.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH,
Attorneys for Petitioner.

Joinder of Issue.

[103]

Filed October 28, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now the respondent in the above-entitled cause, by his attorneys, and joins issue upon the relator's replication to respondent's supplementary answer to the rule to show cause.

OSCAR LAWLER,
Assistant Attorney General.
F. W. CLEMENTS, *First Assistant Attorney.*
C. E. WRIGHT, *Assistant Attorney.*
BRANDENBURG & BRANDENBURG,
Attorneys for Respondent.

Motion to Set Cause for Hearing.

Filed November 26, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now the petitioner in the above entitled action and moves the Court to set a day for the hearing of said cause.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH,
Attorneys for Petitioner.

Oscar Lawler, F. W. Clements, C. N. Wright, Attorneys for Defendant:

Please take notice that on Friday morning, December 3rd, at the hour of 10 o'clock A. M., or as soon thereafter as counsel
[104] can be heard, we shall call the above motion to the attention of Mr. Chief Justice Wright, holding Circuit Court No. 1.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH,
Attorneys for Petitioner.

Copy of Patent.

Filed December 13, 1909.

Allotment Deed 35087A. Cherokee New Born Roll No. 325.

The Cherokee Nation (Formerly Indian Territory), Oklahoma.

To all to whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it is provided that there shall be allotted by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Tribe, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, and,

Whereas, It was provided by said Act of Congress that each citizen shall designate or have designated and selected for him, at the time of his selection of allotment, out of his allotment, as a homestead, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, for which he shall receive a separate certificate, and,

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Eva Waters, a citizen of said tribe, as an allotment, exclusive of land equal in value to forty acres of the average allottable lands of the Cherokee Nation, selected as a homestead as aforesaid.

Now, therefore, I, the undersigned, Principal Chief of the Cherokee Nation, by virtue of the power and authority vested in me by aforesaid Act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said Eva Waters all right, title and interest of the Cherokee Nation, and of all other citizens of said Nation, in and to the following described land, viz.: The South West Quarter of the North West

Quarter of the South East Quarter of Section Seventeen (17), Township Twenty-seven (27) North and Range Sixteen (16) East, and the East Twenty (20) Acres of Lot Two (2) and the West Half of the South East Quarter of the North West Quarter and the North East Quarter of the South East Quarter of the North West Quarter of Section Nineteen (19), Township Twenty (20) North and Range Thirteen (13) East, and the North Half of the North East Quarter of the South East Quarter of Section Twenty-three (23), Township Nineteen (19) North and Range Twenty-five (25) East of the Indian Base and Meridian, in Oklahoma, containing Eighty (80) acres, more or less, as the
[105] case may be, according to the United States survey thereof, subject, however, to all the provisions of said Act of Congress.

In witness whereof, I, the Principal Chief of the Cherokee Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this day of Aug. 21, A. D. 1909.

W. C. ROGERS,
Principal Chief of the Cherokee Nation.

DEPARTMENT OF THE INTERIOR.

Approved Aug. 25, 1909.
RICHARD A. BALLINGER, *Secretary.* [SEAL.]
By OLIVER A. PHELPS, *Clerk.*

Filed for record on the 27 day of Aug. 1909, at 4 o'clock P. M.

(Endorsed.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having custody of the record of Deeds of The Cherokee Nation and that the above and foregoing is a true and correct Copy of the Allotment to Eva Waters as the same appears of record in Book 77, Page 36 of Allotment Deed Record.

In testimony whereof witness my hand this 3 day of Sep., 1909.

DIXON H. BYNUM,
Chief Clerk, in Charge.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the reverse side hereof is a true and correct copy of the receipt evidencing the delivery of deeds to the allotment of Eva Waters, a minor citizen of the Cherokee Nation enrolled under the Act of April 26, 1906, opposite number 325 on the roll of such citizens.

DIXON H. BYNUM,
Chief Clerk, in Charge.

Muskogee, Oklahoma, September 3, 1909.

(Endorsed.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
MUSKOGEE, OKLA., *Aug.* 27, 1909.

Received of the Commissioner to the Five Civilized Tribes the following Deeds issued to Eva Waters Cherokee New Born
[106] Roll No. 325, and recorded in the office of said Commissioner:

Homestead No. 35087A.
Allotment No. 35087A.

(Signed) C. W. WATERS, *Guardian.*

Post Office, Westville, Okla.

Witnesses to mark:

____ ____.
____ ____.

Supreme Court of the District of Columbia.

MONDAY, *December 13th*, 1909.

Session resumed, pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * * * *

No. 51808. At Law.

UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

This cause coming on to be heard upon the pleadings the relator offered to read in evidence, the depositions heretofore taken and filed in this cause which were thereupon identified by the Clerk and marked "F. C. O'C., Dec. 13", 1909," but the Court declined to admit said depositions to be read in evidence, to which ruling exception was noted; whereupon the respondent offered in evidence a patent to the land in controversy issued as set forth in the supplemental answer of the respondent herein filed, to which objection was made by the relator and overruled, and the same was thereupon admitted in evidence, to which ruling the relator then and there noted an exception; that thereupon after due consideration by the Court, it is this 13th day of December, 1909, adjudged and ordered that the rule to show cause heretofore issued herein be discharged, that the prayers of the original and amended petitions herein filed be and the same are hereby denied, and that the original and amended petitions be and the same are hereby dismissed, with costs, against said relator, for which execution shall issue. Appeal noted in open Court and bond for costs fixed at One Hundred Dollars.

[107] *Memorandum.*

January 3, 1910.—$100 deposited in lieu of bond on appeal.

Supreme Court of the District of Columbia.

No.	Parties.	Action.	Plaintiff's attorney-.
51808.	The United States of America *ex relatione* Herman Knight *v.* Richard A. Ballinger, Secretary of the Department of the Interior.	Mandamus.	Zevely, Givens & Smith, Brandenburg & Brandenburg. Defendant's attorney, Oscar Lawler.

Date.			Proceedings.	
1909,	July	16.	Deposit toward costs by Zevely.	
"	"	"	Appearance, order; Petition, Aff't & Exhibits A, B, & C, filed.	
"	"	"	Respondent required to show cause why writ should not issue by 23" inst. (M. 52, p. 342).	
"	"	"	Rule to show cause (2) & copy petition issued.	
"	"	"	Rule to show cause (2) & copy petition served.	
1909,	July	19.	Appearance Lawler for Def't.—Mo. to dismiss & notice	filed.
"	"	23.	Answer to rule	"
"	"	"	Leave to file amended petition (M. 52, p. 347).	
"	"	"	Amended petition & Aff't	"
"	"	"	Stipulation that answer be deemed answer to amended Petition & appearance Brandenburg for Relator	"
"	"	"	Stipulation making exhibits to original petition part of amended petition	"
"	"	28.	Replication	"
"	"	30.	Joinder in Issue	"
"	"	"	Notice of trial	"
"	Aug.	3.	Hearing set for Sept. 2/09 (M. 52, p. 354).	
"	"	16.	Notices (2) to take depositions	"
"	"	19.	" (2) " " testimony	"
"	"	19.	" (2) " produce	"

Date.			Proceedings.	
1909,	Sept.	1.	Supplemental Answer	filed.
"	"	2.	Depositions before Guy L. Reed, Okla.,	"
"	"	"	" " " Chester A. Cowper	"
"	"	"	" " of John Roy	"
"	Oct.	6.	Mo. to dismiss & Notice	"
"	"	13.	" " strike out Supplemental Answer & notice	"
[108] 1909,	Oct.	14.	Leave granted to file supplemental answer (Sept. 1, '09) *nunc pro tunc.* Mo. of Oct. 13, '09, withdrawn & leave granted to demur to sup. answer forthwith (M. 52, p. 383).	
"	"	"	Demurrer filed.	
"	"	"	Mo. of Oct. 6, '09, withdrawn. Demurrer to sup. answer overruled with leave to plead in 10 days (M. 52, p. 383).	
1909,	Oct.	25.	Replication to Answer	filed.
"	"	28.	Joinder in issue	"
"	Nov.	26.	Mo. to set case for trial & notice	"
"	Dec.	13.	Copy of Patent	"
"	"	"	Rule to show cause discharged & Petitions dismissed at Relator's costs; appeal noted—bond $100 (M. 52, p. 469).	
1910,	Jan'y	3.	Deposit $100 by Brandenburg in lieu of appeal bond.	
"	"	"	Depositions of Jno. Roy & of Sep. 2, '09, published by Clerk.	
"	"	22.	Designation of record filed.	
"	Feb'y	3.	Time to file record extended to M'ch 15, '10, inc. (M. 54, p. 44).	

Directions to Clerk for Preparation of Transcript of Record.

Filed January 22, 1910.

In the Supreme Court of the District of Columbia, the 22 Day of January, 1910.

At Law. No. 51808.

U. S. ex Rel. KNIGHT.
vs.
BALLINGER.

The Clerk of said Court will please prepare record on appeal:
Petition, affidavits & Ex.
Rule to show cause.
Motion to dismiss.
Answer.
Amended pet. & aff't.
Stip. as to answer.
" " " exhibits.
Replication.
Joinder of Issue.
Notice of trial.
Order Aug. 3, setting case for hearing.
Supp'l Answer.
All depositions.
Mo. to dismiss.
[109] " " strike.
Leave to file Sup. Answer.
Mo. withdrawn.
Demurrer.
Mo. withdrawn.
Order overruling Demurrer.
Rep. to Answer.
Joinder in issue.
Mo. to set case for trial.
Copy patent.
Rule discharged & pet. dismissed.
Bond.
Docket entries.

BRANDENBURG & BRANDENBURG,
Att'ys for Pl't'ff.

OSCAR LAWLER,
Ass't Att'y Gen.,
By C. E. WRIGHT.

Memorandum.

February 3, 1910.—Time in which to fight Transcript of Record extended from time to time to and including April 1, 1910.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 216, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51808 at Law, wherein the United States of America on the relation of Herman Knight is Plaintiff and Richard A. Ballinger, Secretary of the Department of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of March, A. D. 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2138. The United States of America on the relation of Herman Knight, appellant, vs. Richard A. Ballinger, Secretary of the Department of the Interior. Court of Appeals, District of Columbia. Filed Mar. 18, 1910. Henry W. Hodges, clerk.

[110] COURT OF APPEALS, DISTRICT OF COLUMBIA.

April Term, 1910.

No. 2138.

No. 15 Special Calendar.

THE UNITED STATES OF AMERICA on the relation of HERMAN KNIGHT, Appellant,

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

MOTION TO DISMISS OR AFFIRM.

Now comes here the appellee, by his attorneys, and moves the court to dismiss the appeal herein or in the alternative to affirm the judgment of the court below, upon the following grounds:

(1) Because it appears from the record that a patent has issued to the land in controversy to a person other than appellant, and appellee cannot be compelled to issue another patent to the same land. Wherefore the case presents but a moot question.

(2) Because appellant has no further interest in the subject matter of this case having abandoned his allotment of the land in controversy and secured the allotment to himself of other lands in their place and stead as shown by the exhibits attached to this motion.

(3) Because there is no bill of exceptions in the record herein and therefore no question properly presented to this court for review.

(4) Because appellant has failed to file herein fifteen copies of a printed brief at least five days before the case is liable to be called for argument as required by Section 3, Rule No. VIII of this court.

(5) Because it is manifest that the appeal was taken for delay only.

[111]

OSCAR LAWLER,
Assistant Attorney-General.
F. W. CLEMENTS,
First Assistant Attorney.
C. E. WRIGHT,
Attorneys for Appellee.

Endorsed:) No. 2138 United States ex rel Herman Knight, Appellant, vs. Richard A. Ballinger &c.

Motion to Dismiss or Affirm. Court of Appeals, District of Columbia, filed May 2, 1910. Henry W. Hedges, Clerk.

[112] Wednesday, May 4th A. D. 1910.

THE UNITED STATES OF AMERICA on the relation of HERMAN KNIGHT, Appellant,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior.
} No. 2138.

The motion to dismiss or affirm in the above entitled cause was submitted to the consideration of the court by Mr. Oscar Lawler, of counsel for the appellee in support of motion and by Mr. E. C. Brandenburg in opposition thereto.

The argument in the above entitled cause was commenced by Mr. E. C. Brandenburg, attorney for the appellant, and was continued by Mr. Oscar Lawler, attorney for the appellee, and was concluded by Mr. E. C. Brandenburg, attorney for the appellant. On motion the appellee is allowed five days to file reply brief herein, if so advised.

[113] No. 2138.

THE UNITED STATES OF AMERICA on the relation of HERMAN KNIGHT, Appellant,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior.

Opinion.

Mr. JUSTICE ANDERSON, of the Supreme Court of the District of Columbia, who sat with the court in the hearing of this cause in the place of Mr. Chief Justice Shepard, delivered the opinion of the Court:

The appellant, Herman Knight, a citizen of the Cherokee Nation, in Oklahoma, whose enrolment had been approved by the Secretary of the Interior, and who was entitled to an allotment under the act of Congress approved July 1, 1902, "An act to provide for the allotment of the lands of the Cherokee Nation, for disposition of town sites therein, and for other purposes" (32 Stat. at L., 716 et seq.), on July 16, 1909, filed his petition in the Supreme Court of the District of Columbia against Richard A. Bal-

linger, Secretary of the Interior, praying a writ of mandamus to compel him to deliver to appellant a patent or deed for thirty acres of valuable oil land of said Cherokee Nation which had been executed to him by the chief of the Cherokee Nation in pursuance of an order of the Secretary of the Interior, but which the Secretary thereafter refused, and still refuses, to deliver to appellant. The cause is here on appeal from an order of the court below denying said writ and dismissing said petition.

The petition alleges that on the 28th day of August, 1907, appellant made application to the Commissioner of the Five Civilized Tribes at the Cherokee Land Office to take this particular allotment, to wit, the N. ½ of the S. E. ¼ of the N. W. ¼ and the S. W. ¼ of the S. E. ¼ of the N. W. ¼ of Section 19, township 20 north, range 13 east, in said Cherokee Nation; that, it appearing of record in said office that theretofore, on August 21, 1907, said land had been selected by one Maudie Waters, as a tentative allotment for her minor child, Eva Waters, appellant thereupon filed a contest against said tentative selection; that the various proceedings thereafter had touching said contest culminated in a decision by the Secretary on May 10, 1909, awarding said land to appellant on condition that a certain sum of money be paid over to the Secretary as trustee for the benefit of said Eva Waters, such payment to be completed on or before May 15, 1909; that on May 11, 1909, the Secretary telegraphed the Commissioner of the Five Civilized Tribes that "lands in Twist and Knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty-five thousand dollars for use of minor Waters, contestants given including fifteenth to make payment," and instructed the Commissioner therein to "forward entire twenty-five thousand to department endorsed to Secretary when entire fund received by you" and "Prepare deeds to respective contestants and have them executed and forwarded here for approval;" that thereafter the Commissioner advised the Secretary of the due compliance of appellant with the terms of said telegram so far as his case was concerned (the Twist case not being here involved), and forwarded to the Secretary a deed properly executed by the chief of the Cherokee Nation conveying to appellant the said tract of land; and that "Said deed has been approved by the Secretary" and appellant "complied with all of the requirements imposed upon him by law," but that the Secretary has refused, and still refuses, to deliver the deed and "has ordered other and further proceedings in the Department of the Interior relating to this subject-matter," which appellant claims is in excess of the Secretary's jurisdiction.

although he admits in his petition that under the rules of practice obtaining in the Department of the Interior in Indian affairs *thirty days are allowed from and after notice of a decision within which to file a motion for rehearing or review*, a copy of said rules being annexed to his petition as "Exhibit B" and made a part thereof.

The court below issued an order to show cause, and the Secretary appeared and answered. The answer denies that said proceedings of May 10, 1909, or any proceedings then or at any other time had culminated in a decision awarding said land to appellant, and also denies that the merits of the contest, i. e., whether the appellant (contestant) or Eva Waters (contestee) had the [114] greater right to the allotment of the land in controversy, were considered in making said proposed disposition of the case on May 10, 1909, or that such disposition was a final determination thereof, but that, it being then represented to him that the said Eva Waters, through her guardian, desired to withdraw from said contest in view of the large sum of money offered for such withdrawal and upon the further representation of appellant's counsel that the consideration was amply commensurate with the extent of her potential interest in said land, and that moved by such considerations, he then deemed it to be for the best interests of said Indian ward, Eva Waters, to allow such withdrawal. The answer further avers that immediately thereafter the Secretary was advised by telegram from the parent and guardian of said Eva Waters that said ward protested against the allowance of said withdrawal, on the ground that the same had been induced by gross misrepresentation of the value of the land in controversy; that a motion to review said decision was thereupon presented, in due course by said Eva Waters, through her attorneys, and said motion was heard by the Secretary upon its merits, the appellant appearing at, and participating in, said hearing, through his counsel, and making no objection to the authority or jurisdiction of the Secretary in that behalf; that thereafter on June 24, 1909, the Secretary, being satisfied that the consideration offered for said withdrawal was inadequate, and that he had been misled in adjudging what the best interests of said Indian ward required, vacated the order of May 10, 1909, and thereupon directed that said contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, and that the money deposited on behalf of appellant should be returned to the party depositing it. The answer also avers that the contest case was thereafter duly proceeded with before said Commissioner of the Five Civilized Tribes, but had not yet reached the Secretary

for consideration in the due course prescribed by the rules of practice in such cases obtaining, and further that no certificate of allotment had ever been issued to the appellant as a step preliminary to the issuance of a deed or patent, and, in addition thereto, the Secretary had refused to approve the deed here in controversy until the appellant should show himself, by a trial of the contest case instituted by him, to be entitled to said land in allotment.

On July 28, 1909, appellant filed a replication admitting that the question as to whether he or Eva Waters had the greater right to the allotment in controversy was not decided on its merits, but denying that he had misled the Secretary in adjudging as to the best interests of said Indian ward, and averring, on the contrary, that the Secretary was moved to the action taken by him solely and entirely by investigations conducted upon his own account; and further averring that the consideration of $15,000 to be paid by appellant, as named in the decision of the Secretary, was entirely adequate and for the best interests of the minor contestee, Eva Waters. The replication also averred that the decision of May 10, 1909, authorized appellant to proceed with the development of the land upon the payment of the consideration named therein, and that on May 13, 1909, appellant complied with said condition and immediately erected on said land derricks and other machinery necessary to the drilling for oil and natural gas.

On July 30, 1909, issue was joined on this replication and a number of depositions were taken by the appellant concerning the value of the land in controversy and the expenditures made by appellant, and also as to what Assistant Secretary Pierce did and said about the case while it was pending before him. The appellee took no testimony.

On September 1, 1909, the appellee filed an additional pleading termed "Supplemental Answer," setting up that theretofore, on the 19th day of July, 1909, the matter of the contest then pending before the Commissioner to the Five Civilized Tribes to determine the right as between the appellant and Eva Waters to the land described in the petition came on regularly to be heard before said Commissioner, appellant participating therein by counsel, and the Commissioner thereupon duly and regularly and in accordance with law awarded said land to Eva Waters; that under the rules of practice of said Interior Department relating to such proceedings, appellant was allowed thirty days within which to appeal, but that he failed so to do, and on August 18, 1909, said decision, under said rules, became final; that on August 21, 1909, the principal chief of the Cherokee Nation, pursuant to said decision and

the duty imposed by law (sec. 58, act July 1, 1902, 32 Stat., 725), executed a deed or patent to the land to said Eva Waters, the effect of which was to convey to the latter all the right, title, and interest of the Cherokee Nation in said land, and, on August 25, 1909, the Secretary of the Interior approved the same as required by section 59 of said act of July 1, 1902, which approval operated as a relinquishment to the grantee of all the right of the United States in and to the land embraced in the patent and placed the same beyond the jurisdiction and control of appellee; and appellee prayed in and by said "supplemental answer" to be hence dismissed. Appellant filed a demurrer thereto, which was overruled by the court below. He then filed a general replication, and the appellee joined issue thereon.

On December 13, 1909, the cause was heard by the court below, and a judgment was entered discharging the rule to show cause and dismissing the original and amended petitions, from which judgment this appeal has been prosecuted. Upon said hearing, the appellant offered to read in evidence the depositions taken by him upon the issues originally joined, but the court declined to permit the same, to which ruling an exception was noted. Appellee then offered in evidence, upon the issue joined on the supplemental answer, said patent or deed to Eva Waters, dated August 21, 1909, for the land here involved, to which appellant objected, but said objection was overruled and exception noted.

Under the assignments of error but two general and controlling questions are presented for our determination, viz:

1st. Did the court below err in admitting in evidence the patent to Eva Waters issued by the appellee during the pendency of the cause below, and in refusing to permit appellant to read his testimony in evidence?

2d. Was the appellee acting within his lawful jurisdiction in refusing to deliver the patent to appellant?

[115] 1. It is well settled that the improper admission of evidence in trials by a court without a jury does not of itself constitute reversible error, as the improperly admitted evidence will be rejected by the appellate court and the cause decided as if it were not in the record. Field v. United States, 9 Pet., 182. Arthurs v. Hart, 17 How, 6. So that, while we are clearly of opinion that the action of the appellee in issuing said patent was incompetent as a defense to this action, in view of the settled rule that impossibility of performance can not be pleaded in defense to mandamus where such performance was rendered impossible by defendant's own act (Spelling on Injunctions and Extraordinary

Remedies, 2d ed., sec. 1337; High on Extraordinary Legal Remedies, 3d ed., sec. 14), the judgment below should not be reversed for that error, nor for the refusal of the court below to permit appellant to read his testimony in evidence, *if the record itself sustains the judgment below upon the ground that the appellee acted within his lawful jurisdiction in refusing to deliver a patent to appellant as prayed for in the petition for mandamus herein.*

2. Was the appellee acting within his lawful jurisdiction in refusing to deliver the patent to appellant? If so, the petition for mandamus was properly dismissed. In Garfield v. U. S. ex rel Goldsby, 211 U. S., 249, at p. 262, the United States Supreme Court said:

"We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law."

It is also well settled, of course, that, after the right to the patent has become complete, the execution and delivery of the same are but mere ministerial acts of the officers charged with that duty. Garfield v. U. S. ex rel. Goldsby, supra; Ballinger v. U. S. ex rel. Frost, 216 U. S., 240. Both of these cited cases involved the same act of Congress here concerned, namely, the act of July 1, 1902 (32 Stat. L., 716, et seq.), and the United States Supreme Court held that the *issuance and delivery of an allotment certificate by the Commission to the Five Civilized Tribes was the act which made the right to a patent for any designated allotment complete.* Before the issuance and delivery of such allotment certificate, there is still jurisdiction to refuse the patent. After its issuance and delivery the delivery of the patent becomes a mere ministerial act.

It being admitted upon the pleadings in this case that no allotment certificate has ever been issued to appellant, and further that a motion for review of the decision of May 10, 1909, was filed by Eva Waters within the time allowed by the rules of practice obtaining in the Department of the Interior in Indian affairs, and that, after a further hearing, the order of May 10, 1909, was vacated and an order entered directing that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, it follows that the appellee was acting within his lawful jurisdiction in refusing to deliver said patent to appellant, and, so acting within his lawful

jurisdiction, the admission in evidence of the patent to Eva Waters did not constitute reversible error, nor did the refusal of the court to permit appellant to read his testimony in evidence.

We are unable to agree with the contention of the appellant that the rules of practice obtaining in the Department in reference to rehearings and reviews were inapplicable to this case, nor with appellant's further contention that the filing of appellee's "Supplemental Answer" operated as an abandonment upon his part of every contention except the one sought to be put in issue by it. No authority has been cited by appellant in support of the former contention, and the authority cited as supporting the latter contention, namely, Thompson v. United States, 103 U. S., 431, merely holds that a fact arising since the filing of a return can not be given in evidence without a plea puis darrein continuance.

In our opinion there was no error in dismissing the petition and the judgment below is affirmed with costs.

Affirmed.

[116] Tuesday, October 4, A. D. 1910.

THE UNITED STATES OF AMERICA on the relation of HERMAN KNIGHT, Appellant, vs. RICHARD A. BALLINGER, Secretary of the Department of the Interior. } No. 2138. October Term, 1910.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE ANDERSON.

October 4, 1910.

MR. JUSTICE SHEPARD did not sit in this case.

[117] Tuesday, November 1st, A. D. 1910.

THE UNITED STATES OF AMERICA on the relation of HERMAN KNIGHT, Appellant,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior.
No. 2138.

On motion of Mr. William Hitz of counsel for the appellant, It is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

APPENDIX.

CONTENTS.

	Page
Certificate of R. A. Ballinger, Secretary of the Interior, as to certificate of allotment and letter pertaining thereto	1
Certificate of allotment No. 71803 to Herman Knight, dated April 28, 1910	2
Letter to the Honorable Secretary of the Interior from the Chief Clerk of the Commissioner to the Five Civilized Tribes, dated January 6, 1911	3
Allotment application, Herman Knight, filed July 7, 1906	4
Allotment application, Herman Knight, filed August 28, 1907	5
Allotment application, Herman Knight, filed August 28, 1907	6
Allotment application, Herman Knight, filed February 9, 1910	7
Applications for allotment, Herman Knight, dated February 3, 1910	8-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 758.

UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff in Error,

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APPENDIX TO MOTION TO DISMISS OR AFFIRM AND BRIEF THEREON.

ON BEHALF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

1—480.

UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., Feb. 2, 1911.

PURSUANT to Section 882 of the Revised Statutes, I hereby certify that the annexed copies of certificate of allotment No. 71803, Herman Knight, and letter dated January 6, 1911, addressed to the Secretary of the Interior by Dixon H. Bynum, Chief Clerk of the Commissioner to the Five Civilized Tribes, are true and literal exemplifications of the originals on file in this Department.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

R. A. BALLINGER,
Secretary of the Interior.

(Seal)

FNE

DEPARTMENT OF THE INTERIOR.

CLJ

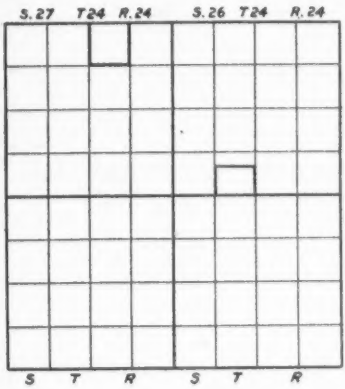
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Roll Number
Cherokee Roll Freedmen Roll
16760.

Certificate No. 71803.

CERTIFICATE OF ALLOTMENT.

CHEROKEE LAND OFFICE.



Muskogee, Okla. IT.
April 28, 1910.

This certifies that Herman Knight on Feb. 9, 1910, filed his selection of the following described land, viz:

Sub-Division of	Sec.	T.	R.
NW ¼ of NE ¼ less 2 acres applied for by School Dist. No. 20	27	24	24
S ½ of SE ¼ of SW ¼	26	24	24

containing 58 acres more or less as the case may be according to the United States survey thereof. Total appraised value of land described in this certificate $116/00.

This certificate is not transferable.

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes.
WSDM.

Refer in reply to the following:

DEPARTMENT OF THE INTERIOR.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma, January 6, 1911.

DIRECT.

Dept. of the Interior.
Received Jan. 9, 1911
to Asst. Atty. Gen.,
Secys. Off. Mails & Files.

THE HONORABLE SECRETARY OF THE INTERIOR.

Sir:

I have the honor to acknowledge receipt of the following telegram:

> "Forward immediately certified copies of allotment certificates issued Herman Knight February nine, Nineteen ten, with certificate of date of delivery.
>
> FRANK PIERCE,
> *First Assistant Secretary.*"

With reference to this matter, I have the honor to advise that the original certificate of allotment issued in the name of Herman Knight for his allotment selection of February 9, 1910, has recently been returned to this office by the Postmaster, delivery thereof having not been effected, and this certificate is inclosed herewith. The record kept of these matters does not show when the certificate in question was returned but it was probably within the last few days, as an entry of the fact that it was returned was made only today. The record of the delivery of this certificate shows that same was forwarded to Herman Knight, at Willmar, Minnesota, on May 9, 1910.

Respectfully,

DIXON H. BYNUM,
Chief Clerk.

WSDM (LS)
Incl. LS-6-1.

(168)

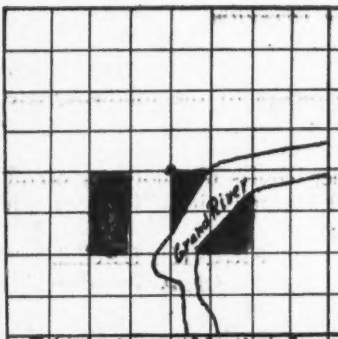
DEPARTMENT OF THE INTERIOR.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

CHEROKEE NATION.

Township No. 2577. Range No. 23 E.

Sec. 32. Sec. —



Herman Knight -- 16760
Homestead.
Lots 4 & 5(14.28 ac.) of Sec. 32-25-23
Filed July 7-1906.
NW 10 ac. of Lot 3 of Sec. 32-25-23
Surplus.
SW 10 ac. of Lot 3 of Sec. 32-25-23
Filed Aug. 28-1907.
Green indicates Homestead.
No Contest.

Appraised value of land
indicated - $145.12

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the official allotment plat showing the allotment selection of Herman Knight in Sec. 32 T. 25 N. R. 23 E. in the Cherokee Nation.

Thos Ryan
Acting Commissioner to the Five Civilized Tribes.

Muskogee Oklahoma,
April 11-1910.

Sec. —. Sec. —.

J. C. K.

(168)

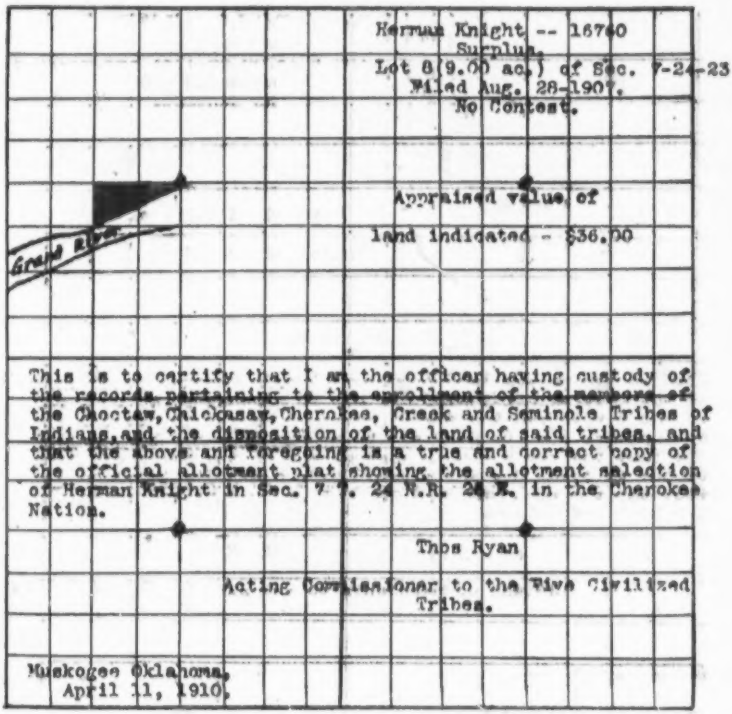
DEPARTMENT OF THE INTERIOR.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

CHEROKEE NATION.

Township No. 2477. Range No. 23 E.

Sec. 7. Sec. —.



Sec. —. Sec. —.

J. C. K.

(168)

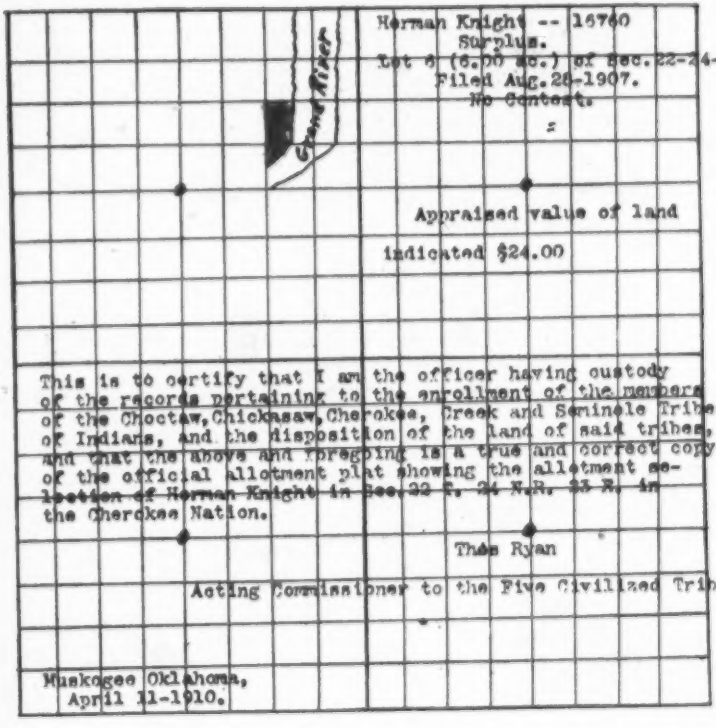
DEPARTMENT OF THE INTERIOR.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

CHEROKEE NATION.

Township No. 2477. Range No. 23 E.

Sec. 22. Sec. —



Sec. —. Sec. —

J. C. K.

(168)

DEPARTMENT OF THE INTERIOR.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

CHEROKEE NATION.

Township No. 2477. Range No. 24 E.

Sec. 27. Sec. 26.

Herman Knight -- 16760
Surplus.
NW4 of NW4 of --Sec.27-24-24
Less 2 ac. applied for by School
Dist. #90
S2 of SW4 of SW4 of Sec.26-24-24
Filed Feb.9-1910.
No Contest.

Appraised value of land
indicated - $116.00

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the official allotment plat showing the allotment selection of Herman Knight in Sec's.26 and 27 T. 24 N.R.24 E. in the Cherokee Nation.

Theo Ryan
Acting Commissioner to the Five Civilized Tribes.

Muskogee Oklahoma,
April 11-1910.

Sec. —. Sec. —.

J. C. K.

Willmar, Minnesota,
February 3rd, 1910.

THE HONORABLE,
THE COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Oklahoma.

Dear Sir:

There is yet due me to complete my allotment of land in the Cherokee Nation, a balance of $120.48, and I hereby request the Honorable Commissioner to the Five Civilized Tribes to cause to be allotted to me land equal in value to the balance due me to complete my allotment as a citizen of the Cherokee Nation, and I request that the following land be allotted to me, to wit:

NW ¼ of the NE¼ of Section 27 Tp 24 N R 24 E
S ½ of the SE ¼ of the SW¼ of Sec. 26 Tp 24 N R 24 E.

If the above described land be allotted my second choice is the following:

E ½ of the W ½ of the NW ¼ of Section 26 Tp 24 N R 24 E
NW ¼ of the SW ¼ of the NW ¼ of Section 26 Tp 24 N R 24 E
SW ¼ of the SW ¼ of the SE ¼ of Sec 26 Tp 24 N R 24 E

My third choice would be the following:

E ½ of the E ½ of the SW ¼ Sec 36 Tp 23 N R 24 E
S ½ of the NW ¼ of the N E ¼ Sec 35 Tp 23 N R 24 E

In the event the above land is taken my next choice would be:

Lot 6, Section 6 Tp 23 N R 24 E
N ½ NE ¼ NW ¼ Sec 35 Tp 23 N R 24 E

Yours very truly,
(Sgd.) HERMAN KNIGHT.

Willmar, Minn.,
Feb. 3rd, 1910.

HONORABLE COMISIONERS

Please let me know just as soon as I am alloted and upon whitch of the Pieces as I want to have some Improvements Put on same at once

Hoping to hear from you at an earley date

I am very truly yurs

(Sgd) HERMAN KNIGHT

Willmar

Minn

C/o Comercial Hotel.

This is to certify that I am the officer having custody of the records pertaining to the enrollment and allotment of lands to members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, and that the above and foregoing is a true and correct copy of a letter from Herman Knight, dated February 3, 1910, requesting the allotment of certain land to him as a portion of his proportionate share of the tribal property of the Cherokee Nation.

(Sgd.) THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes.

Muskogee, Oklahoma,
April 11, 1910.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

UNITED STATES OF AMERICA ON THE RELATION of Herman Knight, Plaintiff in Error,
v.
RICHARD A. BALLINGER, SECRETARY OF the Interior.
} No. 758.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS OR AFFIRM.

I.

Defendant in error, Richard A. Ballinger, Secretary of the Interior, moves the court to dismiss the writ of error in this case on the grounds that:

First. The question presented is a moot one. The records of the Interior Department, certified copies of which are filed herewith, disclose that plaintiff in error, after a refusal of the Secretary of the Interior to allot the land in question to him and after the filing of his petition for mandamus in the court

below, applied to the Secretary of the Interior for allotment of other lands, to the exclusion of the lands involved herein, which application was granted and such other lands duly allotted to him. It is also shown by the record herein that defendant in error has delivered a patent for the land involved in this case to a person other than the plaintiff in error.

Second. The court is without jurisdiction. The record discloses, and plaintiff in error by his pleadings admits, that the Secretary of the Interior had jurisdiction of the controversy which resulted in awarding the land in question to a person other than plaintiff in error. Such jurisdiction was exclusive, and his action is not subject to review by any court, in the absence of proof of fraud or gross mistake of fact, neither of which is alleged.

Third. There is no bill of exceptions contained in the record and, therefore, there is no question properly before the court for review.

II.

Defendant in error also moves, in the alternative, that the judgment of the court below be affirmed because it is manifest the writ of error was taken for delay only.

Respectfully submitted.

F. W. LEHMANN,
Solicitor General.

OSCAR LAWLER,
Assistant Attorney General.

FEBRUARY, 1911.

STATEMENT.

The transcript of the record in this case has not been printed. There is submitted herewith, however, the material portions of the record necessary to be considered on this motion. References to these extracts are designated herein as "Extracts from record."

The following statement from the opinion of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of said District dismissing the petition accurately sets forth the facts (italics in the original):

> The appellant, Herman Knight, a citizen of the Cherokee Nation, in Oklahoma, whose enrolment had been approved by the Secretary of the Interior, and who was entitled to an allotment under the act of Congress approved July 1, 1902, "An act to provide for the allotment of the lands of the Cherokee Nation, for disposition of town sites therein, and for other purposes" (32 Stat. at L., 716 et seq.), on July 16, 1909, filed his petition in the Supreme Court of the District of Columbia against Richard A. Ballinger, Secretary of the Interior, praying a writ of mandamus to compel him to deliver to appellant a patent or deed for thirty acres of valuable oil land of said Cherokee Nation which had been executed to him by the chief of the Cherokee Nation in pursuance of an order of the Secretary of the Interior, but which the Secretary thereafter refused, and still refuses, to deliver to appellant. The cause is here on appeal from an order of the court below denying said writ and dismissing said petition.
>
> The petition alleges that on the 28th day of August, 1907, appellant made application to

the Commissioner of the Five Civilized Tribes at the Cherokee Land Office to take this particular allotment, to wit, the N. ½ of the S. E. ¼ of the N. W. ¼ and the S. W. ¼ of the S. E. ¼ of the N. W. ¼ of section 19, township 20 north, range 13 east, in said Cherokee Nation; that, it appearing of record in said office that theretofore, on August 21, 1907, said land had been selected by one Maudie Waters, as a tentative allotment for her minor child, Eva Waters, appellant thereupon filed a contest against said tentative selection; that the various proceedings thereafter had touching said contest culminated in a decision by the Secretary on May 10, 1909, awarding said land to appellant on condition that a certain sum of money be paid over to the Secretary as trustee for the benefit of said Eva Waters, such payment to be completed on or before May 15, 1909; that on May 11, 1909, the Secretary telegraphed the Commissioner of the Five Civilized Tribes that "lands in Twist and Knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty-five thousand dollars for use of minor Waters, contestants given including fifteenth to make payment," and instructed the Commissioner therein to "forward entire twenty-five thousand to department endorsed to Secretary when entire fund received by you" and "Prepare deeds to respective contestants and have them executed and forwarded here for approval;" that thereafter the Commissioner advised the Secretary of the due compliance of appellant with the terms of said telegram so far as his case was concerned (the Twist case not being here involved), and forwarded to the Secretary a deed properly executed by the chief of the Cherokee Nation conveying to appellant the said tract of land; and that "Said deed has been approved by the Secre-

tary" and appellant "complied with all of the requirements imposed upon him by law," but that the Secretary has refused, and still refuses, to deliver the deed and "has ordered other and further proceedings in the Department of the Interior relating to this subject-matter," which appellant claims is in excess of the Secretary's jurisdiction, although he admits in his petition that under the rules of practice obtaining in the Department of the Interior in Indian affairs *thirty days are allowed from and after notice of a decision within which to file a motion for rehearing or review*, a copy of said rules being annexed to his petition as "Exhibit B" and made a part thereof.

The court below issued an order to show cause, and the Secretary appeared and answered. The answer denies that said proceedings of May 10, 1909, or any proceedings then or at any other time had culminated in a decision awarding said land to appellant, and also denies that the merits of the contest, i. e., whether the appellant (contestant) or Eva Waters (contestee) had the greater right to the allotment of the land in controversy, were considered in making said proposed disposition of the case on May 10, 1909, or that such disposition was a final determination thereof, but that, it being then represented to him that the said Eva Waters, through her guardian, desired to withdraw from said contest in view of the large sum of money offered for such withdrawal and upon the further representation of appellant's counsel that the consideration was amply commensurate with the extent of her potential interest in said land, and that moved by such considerations, he then deemed it to be for the best interests of said Indian ward, Eva Waters, to allow such withdrawal. The answer further avers that immediately thereafter the Secretary

was advised by telegram from the parent and guardian of said Eva Waters that said ward protested against the allowance of said withdrawal, on the ground that the same had been induced by gross misrepresentation of the value of the land in controversy; that a motion to review said decision was thereupon presented, in due course by said Eva Waters, through her attorneys, and said motion was heard by the Secretary upon its merits, the appellant appearing at, and participating in, said hearing, through his counsel, and making no objection to the authority or jurisdiction of the Secretary in that behalf; that thereafter on June 24, 1909, the Secretary being satisfied that the consideration offered for said withdrawal was inadequate, and that he had been misled in adjudging what the best interests of said Indian ward required, vacated the order of May 10, 1909, and thereupon directed that said contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, and that the money deposited on behalf of appellant should be returned to the party depositing it. The answer also avers that the contest case was thereafter duly proceeded with before said Commissioner of the Five Civilized Tribes, but had not yet reached the Secretary for consideration in the due course prescribed by the rules of practice in such cases obtaining, and further that no certificate of allotment had ever been issued to the appellant as a step preliminary to the issuance of a deed or patent, and, in addition thereto, the Secretary had refused to approve the deed here in controversy until the appellant should show himself, by a trial of the contest case instituted by him, to be entitled to said land in allotment.

On July 28, 1909, appellant filed a replication admitting that the question as to whether he or Eva Waters had the greater right to the allotment in controversy was not decided on its its merits, but denying that he had mislead the Secretary in adjudging as to the best interest of said Indian ward, and averring, on the contrary, that the Secretary was moved to the action taken by him solely and entirely by investigations conducted upon his own account; and further averring that the consideration of $15,000 to be paid by appellant, as named in the decision of the Secretary, was entirely adequate and for the best interests of the minor contestee, Eva Waters. The replication also averred that the decision of May 10, 1909, authorized appellant to proceed with the development of the land upon the payment of the consideration named therein, and that on May 13, 1909, appellant complied with said condition and immediately erected on said land derricks and other machinery necessary to the drilling for oil and natural gas.

On July 30, 1910, issue was joined on this replication and a number of depositions were taken by the appellant concerning the value of the land in controversy and the expenditures made by appellant, and also as to what Assistant Secretary Pierce did and said about the case while it was pending before him. The appellee took no testimony.

On September 1, 1909, the appellee filed an additional pleading termed "Supplemental Answer," setting up that theretofore, on the 19th day of July, 1909, the matter of the contest then pending before the Commissioner to the Five Civilized Tribes to determine the right as between the appellant and Eva Waters to the land described in the petition, came on regularly to be heard before said Commissioner, appellant participating therein by counsel, and

the Commissioner thereupon duly and regularly and in accordance with law awarded said land to Eva Waters; that under the rules of practice of said Interior Department relating to such proceedings, appellant was allowed thirty days within which to appeal, but that he failed so to do, and on August 18, 1909, said decision, under said rules, became final; that on August 21, 1909, the principal chief of the Cherokee Nation, pursuant to said decision and the duty imposed by law (sec. 58, act July 1, 1902, 32 Stat., 725), executed a deed or patent to the land to said Eva Waters, the effect of which was to convey to the latter all the right, title, and interest of the Cherokee Nation in said land, and, on August 25, 1909, the Secretary of the Interior approved the same as required by section 59 of said act of July 1, 1902, which approval operated as a relinquishment to the grantee of all the right of the United States in and to the land embraced in the patent and placed the same beyond the jurisdiction and control of appellee; and appellee prayed in and by said "supplemental answer" to be hence dismissed. Appellant filed a demurrer thereto, which was overruled by the court below. He then filed a general replication, and the appellee joined issue thereon.

On December 13, 1909, the cause was heard by the court below, and a judgment was entered discharging the rule to show cause and dismissing the original and amended petitions, from which judgment this appeal has been prosecuted. Upon said hearing, the appellant offered to read in evidence the depositions taken by him upon the issues originally joined, but the court declined to permit the same, to which ruling an exception was noted. Appellee then offered in evidence, upon the issue joined on the supplemental answer, said patent or deed to Eva Waters, dated August 21, 1909,

for the land here involved, to which appellant objected, but said objection was overruled and exception noted. (Extracts from record, pp. 55–59.)

On February 3, 1910, plaintiff in error filed an application for lands in the Cherokee Nation to the exclusion of the lands involved in this case. The lands so applied for by plaintiff in error have been duly allotted to him and allotment certificate has been issued therefor. (See appendix.)

On October 4, 1910, the Court of Appeals of the District of Columbia affirmed the judgment of the Supreme Court of the District of Columbia in dismissing appellant's petition.

ARGUMENT.

I.

The question presented to this court is a moot one. Certified copies of the records of the Interior Department filed herewith show that plaintiff in error, subsequent to the filing of his petition for mandamus in the court below, abandoned his contest for the lands involved in this suit by application for allotment of other lands, which have been duly allotted to him to the exclusion of the lands involved herein and in full satisfaction of his allotment right. It is also shown by the record that defendant in error has delivered patent for the lands involved in this case to a person other than plaintiff in error.

There are submitted herewith duly certified copies of the allotments to plaintiff in error as follows (appendix):

Application filed July 7, 1906, appraised value	$145.12
Application filed Aug. 28, 1907, appraised value	36.00
Application filed Aug. 28, 1907, appraised value	24.00
Application filed Feb. 9, 1910, appraised value	116.00
Total appraised value of plaintiff in error's allotments	321.12

It thus appears that plaintiff in error has been allotted lands in the reservation of the Cherokee Nation to the appraised value of $321.12 and that his last application was filed on February 9, 1910. Under section 7 of the act of Congress approved May 27, 1908 (35 Stat. L., 315), the right of plaintiff in error to said land has become absolute, 60 days having expired since application for allotment was filed, and, as disclosed by the certified copy of the application (appendix), no contest was instituted.

As shown at page 43 of the "Tenth Annual Report of the Commissioner to the Five Civilized Tribes to the Secretary of the Interior for the fiscal year ending June 30, 1903, Washington, Government Printing Office, 1903," the "* * * average value of an allotment in the Cherokee Nation has been fixed at $325.60 * * *."

This court will take judicial notice of statements contained in the above-mentioned Government publication.

> *Caha* v. *United States*, 152 U. S., 211.
> *Knight* v. *United Land Association*, 142 U. S., 161.

It thus appears plaintiff in error has obtained allotments, exclusive of the 30 acres involved in this case, of the value of $321.12 out of a total allowed each citizen of the Cherokee Nation of $325.60.

There are also filed herewith certified copies of the written requests of plaintiff in error, both bearing date February 3, 1910, long subsequent to the filing of the petition for mandamus, for allotment to him of the balance due him. (Appendix.)

In one of these letters plaintiff in error *inter alia* states:

> There is yet due me to complete my allotment of land in the Cherokee Nation, a balance of $120.48 and I hereby request the Honorable Commissioner to the Five Civilized Tribes to cause to be allotted to me land equal in value to the balance due me to complete my allotment as a citizen of the Cherokee Nation.

It is shown by the certified copy of the allotment of February 9, 1910, that the two parcels first mentioned in this letter were allotted to plaintiff in error.

An examination of the three prior allotments made to plaintiff in error as follows discloses that he had theretofore received land of the total appraised value of $205.12. Such prior allotments are:

July 7, 1906, appraised value	$145.12
Aug. 8, 1907, appraised value	36.00
Aug. 28, 1907, appraised value	24.00
Total	205.12

Deducting this amount from the total to which plaintiff in error was entitled, viz, $325.60, leaves, as plaintiff in error stated in his letter, $120.48 as the balance to which he was entitled. This is independent of the land involved in this case.

There is included in the appendix to this brief a certified copy of the allotment certificate for these other lands, issued to plaintiff in error pursuant to his application of February 9, 1910, and there is also included a certified copy of a letter showing the only reason why such allotment certificate was not physically delivered to plaintiff in error was because of the inability of the Post Office Department to locate him.

Plaintiff in error after the filing of his petition for mandamus having applied for and received allotment of lands which, independent and exclusive of those involved herein, fully satisfied his allotment rights, in effect abandoned claim to the lands herein involved, and the question has become a purely academic or moot one. If the judgment of the Court

of Appeals of the District of Columbia were reversed, defendant in error could not legally issue to plaintiff in error a patent for the land involved herein, for the reasons just stated, and for the further reason that defendant in error has heretofore delivered patent to these lands to another person, viz, Eva Waters.

There is clearly no case or controversy, within the meaning of those terms as employed in the Constitution, before this court for determination, and this writ of error should therefore be dismissed.

II.

Want of jurisdiction. The record discloses and plaintiff in error admits by his pleadings that the Secretary of the Interior had jurisdiction of the controversy when he awarded the lands which are the subject of this proceeding to a person other than plaintiff in error. Such jurisdiction was exclusive and his action is not subject to review by any court, in the absence of proof of fraud or gross mistake of fact, neither of which is alleged.

The following allegations contained in the thirteenth paragraph of the answer of the Acting Secretary of the Interior to the petition and amended petitions is not denied or traversed by the replication:

> But he (the Secretary) does aver that under the rules of practice obtaining in the Department of the Interior, in Indian Affairs, thirty days are allowed from and after notice of a decision within which time to file a motion for review thereof, and that on May 21, 1909, in the presence of counsel representing the said Eva Waters and the said Herman Knight * * * he announced to said counsel that the said Eva Waters should have up and in-

> cluding the 9th day of June, 1909, within which to file a motion for review of said order of May 10, 1909, and that counsel for said Eva Waters then and there gave notice that he would file and present such motion. (Extracts from record, pp. 21, 22, 32.)

The admission by petitioner that under the rules and regulations of the Department of the Interior Eva Waters had the right to file a motion for review within 30 days after the order of May 10, 1909, is an admission which, under the decisions of this court, carries the conclusion that the Secretary of the Interior still had jurisdiction and control of the controversy.

In fact, plaintiff in error by his petition admitted as much. The Court of Appeals in its opinion particularly refers to this. It is there stated (italics in the original):

> * * * he (appellant) admits in his petition that under the rules of practice obtaining in the Department of the Interior in Indian affairs *thirty days are allowed from and after notice of a decision within which to file a motion for rehearing or review*, a copy of said rules being annexed to his petition as "Exhibit B" and made a part thereof. (Extracts from record, p. 57.)

In the case of *Beley* v. *Naphtaly* (169 U. S., 353, 364) this court said:

> We are also of opinion that the rejection by the Secretary of the Interior of the first application made by the defendant in error for a patent and the subsequent granting of a rehearing and the issuing of a patent thereafter by the Secretary, were all acts within the

> jurisdiction of that officer. The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office. The Secretary who made the first decision herein could have granted a rehearing and reversed his former ruling.

(See also *Greenameyer* v. *Coate*, 212 U. S., 434.)

The action of the Secretary in granting a rehearing and subsequently vacating his decision of May 10, 1909, was entirely within his discretion and can not be the subject of review by any court.

> *New Orleans* v. *Paine*, 147 U. S., 261, 266.
> *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S., 589.

It will thus be seen from the facts stated and the authorities cited that the order of May 10, 1909, made by the Assistant Secretary of the Interior was merely an interlocutory order. Under the rules and regulations of the department a rehearing was granted and additional testimony taken. All of the parties in interest were given an opportunity to be heard, and were heard, at this rehearing. After full consideration, and on June 24, 1909, the Acting Secretary of the Interior vacated the order of May 10, 1909, and

directed that the contest then pending before the Commissioner to the Five Civilized Tribes be proceeded with to the end that a determination of the controversy might be had upon the merits.

> Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.
>
> The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary uncontrolled by the courts. (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, 324, 325.)

As was said by Mr. Justice Brewer in *Brown* v. *Hitchcock* (173 U. S., 473, 476):

> Until the legal title to public lands passes from the government inquiry as to all equitable rights comes within the cognizance of the Land Department. In *United States* v. *Schurz*, 102 U. S. 378–396, which was an application for a mandamus to compel the delivery of a patent, it was said: "Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government, conveyed to the citizen. This court has with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."
>
> * * * *
>
> As a general rule no mere matter or administration in the various executive departments of the government can, pending such administration, be taken from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States. * * *
>
> But what we do affirm and reiterate is that power is vested in the departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the government. When it has so passed the litigation will proceed as it generally ought

> to proceed, in the locality where the property is situate, and not here where the administrative functions of the government are carried on.

The record shows in this case no allotment certificate was ever issued to plaintiff in error for these lands. (Extracts from record, pp. 24 and 34–35.)

The following from the opinion of the Court of Appeals in this case is, we submit, the law as repeatedly held by this court:

> It being admitted upon the pleadings in this case that no allotment certificate has ever been issued to appellant, and further that a motion for review of the decision of May 10, 1909, was filed by Eva Waters within the time allowed by the rules of practice obtaining in the Department of the Interior in Indian affairs, and that, after a further hearing, the order of May 10, 1910, was vacated and an order entered directing that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, it follows that the appellee was acting within his lawful jurisdiction in refusing to deliver said patent to appellant * * *. (Extracts from record, p. 60.)

III.

There is no bill of exceptions contained in the record and, therefore, there was no question properly before the Court of Appeals for review, and there is none before this court.

In *Michigan Insurance Co.* v. *Eldred* (143 U. S., 293, 298) this court said:

> By the uniform course of decision, no exceptions to rulings at a trial can be considered

> by this court unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end.

Mr. Justice Lurton quoted the above paragraph in speaking for the court in the very recent case of *Jennings* v. *Philadelphia, Baltimore & Washington Railway Co.*, decided October 31, 1910, published in Advance Sheets, December 15, 1910, pages 1 and 2, Lawyers Cooperative Publishing Co.

(See also *Balto. & Pot. R. R. Co.* v. *Trustees, etc.*, 91 U. S., 127; *Young* v. *Martin*, 8 Wall., 354; *Williams* v. *Norris*, 12 Wheaton, 117.)

IV.

It is manifest the appeal was taken for delay only.

As we have before pointed out, the order of May 10, 1909, upon which plaintiff in error predicates his right to a writ of mandamus, was simply an interlocutory order made by the Assistant Secretary of the Interior. The rules and regulations of the Inte-

rior Department provided for a rehearing of such interlocutory order, and in accordance with the terms of such regulations a rehearing was granted. As a result of that rehearing the Assistant Secretary of the Interior set aside the order of May 10, 1909, and directed that the contest over the land between plaintiff in error and Eva Waters, then pending before the commissioner to the Five Civilized Tribes, be proceeded with to the end that such contest might be determined on its merits and the land awarded to the person entitled thereto.

This contest was determined in favor of Eva Waters and thereupon a patent was issued to her, vesting the title to the land in controversy in her. Certainly the title to that land can not be contested in this mandamus proceeding, to which Eva Waters is not a party, but plaintiff in error is relegated to the courts of the State where the land is situated for the assertion of any rights he may deem he has to such land.

This was the situation when plaintiff in error brought the case to this court. It would seem manifest, therefore, that the writ of error was taken for delay only. This is made more certain by the fact that plaintiff in error has abandoned his claim to the land in controversy by having sought and obtained allotments of other lands in full satisfaction of the right upon which his claim asserted in the litigation is predicated.

For the reasons stated, it is respectfully submitted that the writ of error should be dismissed, or that the judgment should be affirmed.

F. W. LEHMANN,
Solicitor General.
OSCAR LAWLER,
Assistant Attorney General.

FEBRUARY, 1911.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

UNITED STATES OF AMERICA ON THE Relation of Herman Knight, plaintiff in error, v. RICHARD A. BALLINGER, SECRETARY of the Interior.	No. 758.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

NOTICE.

FREDERIC D. MCKENNEY, Esq.,
Hibbs Building, Washington, D. C.

DEAR SIR: Please take notice that a motion to dismiss or affirm the above-entitled cause, together with brief, appendix, and extracts from record, copies of each of which are hereto attached will be presented to the court on Monday, February 27, 1911, at 12 o'clock noon, or as soon thereafter as counsel can be heard.

Very truly, yours,

F. W. LEHMANN,
Solicitor General.
OSCAR LAWLER,
Assistant Attorney General.

Service of a copy of above motion to dismiss or affirm the above-entitled cause together with copies of brief, appendix, notice, and extracts from record, admitted this —— day of February, 1911.

○

SUBJECT INDEX.

	Page
General statement	1
Triangular claim to lands	2
Waters request for leave to relinquish	3
Action of Secretary of Interior, May 10, 1909	4
Telegram to Commissioner to Five Civilized Tribes, May 11, 1909	5
Payment of $25,000 by lessees of Twist and Knight	6
Institution of mandamus proceeding	6
Rule to show cause issued July 16, 1909	7
Judgment of Supreme Court of the District of Columbia, December 13, 1909	7
Judgment of Court of Appeals of the District of Columbia, October 14, 1901	7
Code of Law of the District of Columbia *re* procedure in mandamus	8
Pleadings	8
Depositions taken and case set for hearing	9
Supplemental answer of respondent	9
Action of Supreme Court of the District of Columbia thereon	10
Proceedings in Court of Appeals of the District of Columbia	11
Extracts from opinion, Court of Appeals of the District of Columbia	11
Assignment of errors	15
Short point	17
Jurisdiction	18
Argument on merits in general	19
Contents of pleadings *re* fraud, mistake	19
Orders of Secretary of June 24 and 30, *re* order of May 10, 1909	20
Replication of relator	23
Absence of proofs *re* fraud, mistake	25
Relator's contention	28
Allotment certificate not necessary	29
Act of July 1, 1902 (32 Stats. L., 716)	30
Relator's allotments free from all restrictions	34
Patent to relator served double purpose of allotment, certificate, and conveyance	37
Plea *puis darrein continuance*	46
Moot case	48
Absence of bill of exceptions	48
Conclusion	50

CASES CITED.

	Page
Angus *vs.* Chicago Trust, etc., Co., 170 Ill., 298	47
Ballinger *vs.* United States *ex rel.* Frost, 216 U. S., 240	6, 17, 38
Barber *vs.* Palmer, 1 Ld. Raym., 693	47
Barney *vs.* Dolph, 97 U. S., 652	41
Butterworth *vs.* United States *ex rel.* Hoe, 112 U. S., 50	41
City of Wilmington *vs.* Ricaud, 90 Fed., 212	49
Clinton *vs.* Missouri Pacific Ry., 122 U. S., 469	49
Cornelius *vs.* Kessel, 128 U. S., 456	40
Deming Investment Co. *vs.* United States, 224 U. S., 471	34
Frasher *vs.* O'Connor, 115 U. S., 112	41
Garfield *vs.* United States *ex rel.* Goldsby, 211 U. S., 249, 263	6, 41, 43
Goat *vs.* United States, 224 U. S., 458	34
Gritts *vs.* Fisher, 224 U. S., 640	2
Insurance Co. *vs.* Piaggio, 16 Wall., 378	49
Jennings *vs.* Philadelphia, Baltimore & Wilmington Railroad Co., 218 U. S., 255	48
Knight *vs.* United States Land Ass'n, 142 U. S., 161	34
Michigan Ins. Bank *vs.* Eldred, 143 U. S., 293	48
Noble *vs.* Union River Logging R. R. Co., 147 U. S., 165	7, 41
Orchard *vs.* Alexander, 157 U. S., 383	40
Roberts *vs.* United States, 176 U. S., 221	41
Scott *vs.* Brokaw, 6 Blackf., 243 (Ind.)	46
United States *vs.* Schurz, 102 U. S., 378	41
United States *ex rel.* Parish *vs.* MacVeagh, 214 U. S., 124	6
Vaughan *vs.* Brown, 2 Stra., 1106	47
Wallace *vs.* McConnell, 13 Pet., 136	14, 46
Waterbury *vs.* McMillan, 46 Miss., 635	47
Wisdom *vs.* Williams, 30 Fed. Cas. No. 17904	46
Yeaton *vs.* Lynn, 5 Pet., 224, 231	46

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 163.

THE UNITED STATES OF AMERICA ON THE RELATION OF HERMAN KNIGHT, PLAINTIFF IN ERROR,

vs.

WALTER L. FISHER, SECRETARY OF INTERIOR, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

GENERAL STATEMENT.

The controversy in some measure involves the title to, and right to possession of some thirty (30) acres (originally fifty (50) acres in one block, but twenty (20) acres thereof have since been eliminated) of allottable lands of the Cherokee Nation, situate near Tulsa, in Oklahoma, and deemed to be

more than commonly valuable because of their supposed oil-bearing quality.

The entire fifty (50) acres in a single block had been selected August 21, 1907, by one Maudie Waters, a Cherokee citizen, as a tentative allotment for her minor child, Eva, who belonged to the so-called "after-born babies" class of Cherokee citizens. The right of this class to participate in allotments of Cherokee lands was then being fiercely disputed and was not finally determined until about May 13, 1912, when this court made public its opinion and judgment establishing such right in the case of Gritts *vs.* Fisher, 224 U. S., 640.

William Twist and the relator Knight, both duly enrolled Cherokee citizens entitled to demand and receive allottable lands of the Cherokee Nation in excess of the acreage above stated, initiated contests before the Commissioner to the Five Civilized Tribes against separate parcels of the tentative selection made in behalf of the minor, Eva Waters. Twist claimed, adversely to the minor, the right to select the west twenty (20) acres of the tract; Knight made similar claim to the east thirty (30) acres. Trial of the Twist *vs.* Waters claim was had before the Commissioner to the Five Civilized Tribes and resulted in a judgment in favor of Twist, which was reversed on appeal to the Commissioner of Indian Affairs and further appeal taken to the Secretary of the Interior. In this aspect of that case, the Knight claim having been

held in abeyance pending final disposition of Twist's case, motions were filed with the Commissioner to the Five Civilized Tribes by the father and mother of the minor, Eva Waters, acting as her natural guardians, praying that said minor be permitted to retire from further prosecution of the Twist case upon the payment for her use of $4,800, and that she be permitted to confess judgment in favor of Knight upon the payment for her use of the sum of $7,200.

The Commissioner to the Five Civilized Tribes forwarded these motions, through the Commissioner of Indian Affairs, to the Secretary of the Interior, with the recommendation that the compromise be approved and that the minor, upon receipt of $12,000, "provided no better offer can be obtained," be permitted to relinquish her claim to the entire fifty acres of land (R., 12).

Mr. A. W. Clapp, an attorney of Muskogee, "representing the guardians of the minor," appeared before the Department "and contended that the offer of $12,000 should be accepted." Mr. A. R. Serven, an attorney of Washington, D. C., likewise appeared, "claiming to represent the legal guardian of the minor" and opposed the offer, contending that a better settlement could be secured (R., 12).

The Department announced to the above-named attorneys, "and to other attorneys who represented the interests of oil men in and around Tulsa," that it was of opinion that the offer of $12,000 should

not be accepted, and thereafter the Little Rock Oil Company and others, through their attorney Mr. J. W. Zevely, offered to pay for the use of the minor $25,000 "for a relinquishment of her claim and an award of the land to the respective contestants [Twist and Knight] (R., 12).

The Olympus Oil Company, through Attorney Serven, also submitted an offer "embodied in full in a paper filed in the Department on the 8th day of May, 1909 (R., 12), the details of which do not appear.

The Department (First Assistant Secretary Frank Pierce acting), after full consideration, first declaring that "the uncertainty of the outcome of this controversy is so overbearing (*sic*) upon the Department * * * that a reasonable compromise of her (the minor Eva's) rights should be accepted;" that the controversy "is simply a question as to which of the three parties may have the land;" that if the minor "be permitted to withdraw, there is no legal objection standing in the way of awarding the thirty acres to Knight and the twenty acres to Twist, and patents be issued to them speedily;" that as the Little Rock Oil Company's proposition, "the first proposition," gave "the minor child $25,000 in cash," while "the second proposition" (the Olympus Oil Company's proposition) "involves the determination of these cases upon their merits, which is, to say the least, an uncertain issue, and in the meantime the land is being wasted and drained," decided "to approve the $25,000 propo-

sition, to permit the child to withdraw her contest, and to award the land to Twist and Knight, respectively," and gave "Mr. Zeveley's clients," the Little Rock Oil Co., P. J. White, and others, "up to and including the 15th instant to make the payment of the $25,000" (R., 13).

This opinion, embodying the conclusion of the Department in the premises, under date of May 12, 1909, was indorsed "referred to the Commissioner to the Five Civilized Tribes for appropriate action" (R., 13), while, on the day previous, Assistant Secretary Pierce telegraphed that official as follows:

> "Washington, D. C., May 11th, 1909.
>
> "Ryan, Acting Com'r, Muskogee, Oklahoma.
>
> "Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight, respectively, upon payment of twenty-five thousand dollars for use of Minor Waters. Contestants given including fifteenth to make payment. Upon receipt of thirteen thousand more within time allowed forward entire twenty-five thousand to Department indorsed to Secretary. When entire fund received by you, prepare deeds respective contestants and have them executed and forwarded here for approval. Report *promised* (promptly) by wire.
>
> "FRANK PIERCE,
> *"First Ass't Sec'y."*

The entire $25,000 was paid to the Commissioner to the Five Civilized Tribes well within the time limited as above, and together with the patents in favor of Twist and Knight, respectively, each duly executed as required by law by the principal chief of the Cherokee Nation, was forwarded by said Commissioner on the 15th day of May, 1909, to the Secretary of the Interior, as directed. The Secretary of the Interior, however, for reasons satisfactory to himself, and which will no doubt sufficiently appear later on, refused either to approve or deliver the patent for the thirty (30) acre tract allotted to Knight, although in so far as this record discloses he has not yet returned the purchase price of $15,000 nor any part thereof paid therefor and ordered other and further proceedings to be had with regard thereto (R., 3, 17-18).

The action, instituted July 16, 1909, in the Supreme Court of the District of Columbia, is in the name of the patentee, Knight, and for the general and joint benefit of Knight and his lessees, P. J. White and others above named, who provided the funds and made the payments above indicated. It is an application for mandamus, under the Code of Law, D. C., 1901 (sections 1273 to 1283, inclusive), and seeks upon principles analogous to those defined and established as controlling in Garfield *vs.* U. S. *ex rel.* Goldsby, 211 U. S., 249; Ballinger *vs.* U. S. *ex rel.* Frost, 216 U. S., 240; U. S. *ex rel.* Parrish *vs.* MacVeagh,

214 U. S., 124, and Noble *vs.* Union River Logging Co., 147 U. S., 165, to require the Honorable Walter L. Fisher, at present Secretary of the Interior, to deliver to the relator—

> "the said deed properly recorded as required by law * * * and to do and perform all such other acts and things in the premises as the law may require" (R., 4, 24).

Rule to show cause issued and was served July 16, 1909, and respondent having answered, various other proceedings were had in said Supreme Court, which culminated December 13, 1909, in a judgment, without opinion, dismissing relators' petition with costs (R., 116).

From this judgment appeal was prosecuted to and before the Court of Appeals of the District of Columbia (R., 117-120), and after argument that court, on October 4, 1910, affirmed the judgment of the lower court (R., 126) upon grounds set forth in an elaborate opinion (R., 121-126).

To review the judgment of the Court of Appeals, D. C., a writ of error was prayed and allowed from this court (R., 126), and same having been duly perfected November 2, 1910 (R., 128, 129), the transcript of record was filed herein November 4, 1910.

Procedure Pertaining to Mandamus Cases in Supreme Court, District of Columbia, and the Conduct of This Cause With Reference Thereto.

Section 1273 of the Code of Law, D. C., requires all applications for mandamus to be commenced by verified petition, setting forth fully the grounds of application, while the defendant is required (section 1275) to file an answer verified by his affidavit "fully setting forth all the defenses upon which he intends to rely in resisting such application."

The petitioner may plead to or traverse all or any of the material averments set forth in defendant's answer, and the defendant must then take issue or demur to such plea or traverse within five days "and such further proceedings shall thereupon be had in the premises for the determination thereof as if the petitioner had brought an action for a false return" (section 1276).

By section 1278 all such issues must be tried by jury "if both parties in writing require it, otherwise they shall be heard and determined by the court."

The pleadings are voluminous and include an Amended Petition (R., 21), an Answer thereto by Respondent (R., 15, 24), a Replication by Relator (R., 25), which denies the truth of practically all of the material averments of fact contained in said Answer and a Joinder of Issue by the Respondent upon such replication (R., 29).

August 3, 1909, on motion of respondent, the court set the cause for hearing September 2, 1909 (R., 30), prior to which day a number of depositions bearing at length and materially upon the issues joined as above stated were taken and on said day same were filed in the cause (R., 33-109).

September 1, 1909, without leave of court first obtained, the respondent filed a further pleading styled a "Supplemental Answer" (R., 31), wherein it is averred that, as the result of various proceedings conducted before the Commissioner to the Five Civilized Tribes, *on July 19, 1909, and subsequent dates* (petition for mandamus herein having been filed and served on respondent July 16, 1909), the Department of the Interior, through the office of the Commissioner of Indian Affairs, "in the ordinary course of its duty in the premises," delivered to the lawful guardian of the said Eva Waters a deed duly executed in the manner required by law and duly approved by the Secretary of the Interior, conveying to the said Eva Waters the title to the real property described in relator's petition, and that by reason of the execution and delivery of said deed the Department of the Interior and its various officials were without "any power, authority, or jurisdiction over the land * * * described," and without "any duty, right, or authority to execute or deliver, or cause to be executed or delivered, any conveyance covering the property to the relator herein or to any

other person," and hence respondent prayed to be dismissed with his costs (R., 32).

October 14, 1909, leave of court to file this "Supplemental Answer" *nunc pro tunc,* as of September 1, 1909, with leave to the relator to demur thereto, was granted, and (R., 111), demurrer having been filed (R., 112) and overruled (R., 111), relator, "without waiving his rights under the demurrer heretofore filed," traversed and denied the allegation of such "Supplemental Answer" (R., 112, 113). Issue having again been joined (R., 113) and the case coming on to be heard, the relator "offered to read in evidence the depositions heretofore taken and filed in this cause * * *, but the court (apparently of its own motion) declined to admit said depositions to be read * * *, to which ruling exception was noted" (R., 116).

Thereupon the respondent, over the objection and exception of relator, submitted in evidence the patent described in said Supplemental Answer (R., 116, 114), and immediately the learned trial court "adjudged and ordered that the rule to show-cause * * * be discharged" and relator's petitions for mandamus "be, and the same are hereby dismissed with costs, * * * for which execution shall issue" (R., 116).

Proceedings in the Court of Appeals of the District of Columbia.

From this judgment the relator prayed and was allowed an appeal to the Court of Appeals of the District of Columbia, and the transcript of the record having been docketed in that court, respondent moved to dismiss the appeal, or in the alternative to affirm the judgment (R., 120), because, among other grounds, patent had been issued for the land in controversy to a person other than appellant, and issuance of a second patent therefor could not be compelled by mandamus, and also because the record contained no bill of exceptions and consequently presented no questions for review.

After hearing and upon consideration the court, in an elaborate opinion which recites (R., 121-124) with reasonable fullness the pertinent portions of the very voluminous and confusing pleadings, declared that (R., 124)—

> "Under the assignments of error but two general and controlling questions are presented for our determination, viz:
>
> "1st. Did the court below err in admitting in evidence the patent to Eva Waters issued by the appellee during the pendency of the cause below, and in refusing to permit appellant to read his testimony in evidence?
>
> "2d. Was the appellee acting within his lawful jurisdiction in refusing to deliver the patent to appellant?"

The court disposed of the first question as follows:

> "1. It is well settled that the improper admission of evidence in trials by a court without a jury does not of itself constitute reversible error, as the improperly admitted evidence will be rejected by the appellate court and the cause decided as if it were not in the record (Field *vs.* United States, 9 Pet., 182; Arthurs *vs.* Hart, 17 How., 6). So that, while we are clearly of opinion that the action of the appellee in issuing said patent was incompetent as a defense to this action, in view of the settled rule that impossibility of performance cannot be pleaded in defense to mandamus where such performance was rendered impossible by defendant's own act (Spelling on Injunctions and Extraordinary Remedies, 2d ed., sec. 1377; High on Extraordinary Legal Remedies, 3d ed., sec. 14), the judgment below should not be reversed for that error, nor for the refusal of the court below to permit appellant to read his testimony in evidence, if the record itself sustains the judgment below upon the ground that the appellee acted within his lawful jurisdiction in refusing to deliver a patent to appellant as prayed for in the petition for mandamus herein" (R., 124, 125).

With respect to the second question the court said:

> "2. Was the appellee acting within his lawful jurisdiction in refusing to deliver the patent to appellant? If so, the petition for mandamus was properly dismissed. In

Garfield *vs.* U. S. *ex rel.* Goldsby, 211 U. S., 249, at p. 262, the United States Supreme Court said:

"'We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law.'

"It is also well settled, of course, that, after the right to the patent has become complete, the execution and delivery of the same are but mere ministerial acts of the officers charged with that duty (Garfield *vs.* U. S. *ex rel.* Goldsby, *supra;* Ballinger *vs.* U. S. *ex rel.* Frost, 216 U. S., 240). Both of these cited cases involved the same act of Congress here concerned, namely, the act of July 1, 1902 (32 Stat. L., 716 *et seq.*), and the United States Supreme Court held that the issuance and delivery of an allotment certificate by the Commission to the Five Civilized Tribes was the act which made the right to a patent for any designated allotment complete. Before the issuance and delivery of such allotment certificate, there is still jurisdiction to refuse the patent. After its issuance and delivery the delivery of the patent becomes a mere ministerial act.

"It being admitted upon the pleadings in this case that no allotment certificate has ever been issued to appellant, and further that a motion for review of the decision of May 10, 1909, was filed by Eva Waters within the time allowed by the rules of practice obtaining in the Department of the In-

> terior in Indian affairs, and that, after a further hearing, the order of May 10, 1909, was vacated and an order entered directing that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, it follows that the appellee was acting within his lawful jurisdiction in refusing to deliver said patent to appellant, and, so acting within his lawful jurisdiction, the admission in evidence of the patent to Eva Waters did not constitute reversible error, nor did the refusal of the court to permit appellant to read his testimony in evidence."

Upon the propositions pressed by relator as to the inapplicability to the present case of the general rules of practice respecting rehearings, and to the effect that the "Supplemental Answer," filed after issues had been joined and evidence with respect thereto had been taken, constituted but a plea *puis darrein continuance* which superseded all other pleas and defenses theretofore projected in the cause (Wallace *vs.* McConnell, 13 Peters, 136, 151, 152), the court said (R., 126):

> "We are unable to agree with the contention of the appellant that the rules of practice obtaining in the Department in reference to rehearings and reviews were inapplicable to this case, nor with appellant's further contention that the filing of appellee's "Supplemental Answer" operated as an abandonment upon his part of every contention except the one sought to be put in

issue by it. No authority has been cited by appellant in support of the former contention, and the authority cited as supporting the latter contention, namely, Thompson *vs.* United States, 103 U. S., 431, merely holds that a fact arising since the filing of a return cannot be given in evidence without a plea *puis darrein continuance.*

"In our opinion there was no error in dismissing the petition and the judgment below is affirmed with costs."

To review this judgment (R., 126) and to secure a reversal thereof for errors therein the present writ of error was brought.

ASSIGNMENT OF ERRORS.

The Court of Appeals of the District of Columbia erred—

1. In adjudging that the Secretary of the Interior acted lawfully in withholding from relator delivery of the patent running to him for the described lands, the right to receive such patent having been purchased by relator by paying in full therefor the price fixed, after full hearing and investigation as to value, by the Secretary of the Interior.

2. In adjudging that, under the law and the circumstances pervading this case, the issuance and delivery of an allotment certificate by the Commission(er) to the Five Civilized Tribes was the act

which made the right to receive the patent complete, and that until the issuance and delivery of such an allotment certificate delivery of patent might lawfully be withheld because only after the issuance and delivery thereof did the delivery of patent become a mere ministerial act.

3. In adjudging that, notwithstanding the acceptance by relator of the proposal contained in the order of the Secretary of the Interior of May 10, 1909, and the payment to the Commissioner of the Five Civilized Tribes of the sum of $25,000 for the Waters relinquishments, and the subsequent execution and delivery by the principal chief of the Cherokee Nation of a patent running to relator for the described lands, it was competent for said Secretary to revoke his said order and to reopen the proceedings, no fraud nor mistake therein having been shown.

4. In adjudging that the so-called "Supplemental Answer," though in effect and to every intendment but a plea *puis darrein continuance,* did not supersede all prior pleas or defenses interposed by respondent in the cause, and the issue joined thereunder having been ruled in relator's favor in not thereupon reversing the judgment of the Supreme Court of the District of Columbia and ordering the peremptory writ of mandamus to issue as prayed.

SHORT POINT.

Shortly stated, the argument is that the execution by the Principal Chief of the Cherokee Nation of the patent in favor of Knight, under the circumstances narrated, rendered the issuance of an allotment certificate unnecessary. The patent itself contained within its four corners all pertinent recitals of such a certificate and in addition the appropriate words of grant and conveyance necessary to vest in the patentee title to the lands described. The patent being at least equal in legal potency to and certainly of greater dignity than an allotment certificate, the execution and delivery of the former by the Principal Chief of the Nation materially advanced the mutation of title to the lands described therein beyond the point usually indicated by the issuance of the latter. In the absence of fraud or mistake, and neither is shown to have had existence in these proceedings, the rights of the patentee in and to the land became fixed and vested, and thereafter the Secretary of the Interior had but the ministerial power and duty of effecting the recordation and delivery of the patent, "a duty which, within all the definitions, can be enforced by the writ of mandamus." The case of Ballinger, Sec'y, etc., *vs.* U. S. *ex rel.* Frost affords convenient authority for the maintenance of this action, and in our view, with all submission, renders the reversal of the judgment of the Court of Appeals certain.

JURISDICTION.

Neither the jurisdiction of this court nor that of either of the lower courts is disputed. It is averred that the lands involved are of more than $10,000 in value (R., 23). The Secretary of the Interior found that the mere right to claim them by way of allotment was worth $15,000 and relator paid that sum for the relinquishment of such claim.

The amount or value in dispute being in excess of the statutory requirement, the jurisdiction of this court in the premises would seem to be clear.

ARGUMENT.

The right on the part of relator to compel by means of mandamus the delivery by the Secretary of the Interior of the duly executed Cherokee deed or patent, which is the object of this proceeding, depends upon—

1. Whether, by the execution and delivery of such patent by the Principal Chief of the Cherokee Nation under the circumstances of the case, title to the lands described in said patent passed from the Nation and became vested in relator as the grantee named therein; and,

2. Whether the proceedings anterior to the execution and delivery of such patent were free from

fraud or misrepresentation on the part of relator and his privies, and free from mistake on the part of the Secretary of the Interior and the Principal Chief of the Cherokee Nation.

We do not hesitate to say, and our assertion in whatever aspect viewed will, in every particular, be upheld by the record when read in lawyerlike fashion, that there is a total absence of any showing of fraud, misrepresentation or mistake on the part either of relator or the Secretary in the premises.

All that does appear, stating the matter most favorably for respondent is, that upon a full and open hearing, directed to ascertaining the immediate cash value of the then doubtful allotment right of the minor Eva Waters in and to the entire fifty (50) acre tract selected for her by her mother and guardian, aided by an independent examination conducted by the Secretary of the Interior, through the Commissioner to the Five Civilized Tribes and his official Oil Inspector (R., 93-96), the Secretary himself having personally inspected the lands and thereby informed himself directly as to their character, condition, situation, and surroundings, the Secretary rejected the offer of $12,000 ($7,200 for the 30 acres selected by relator) made in relator's interest by "Mr. Zevely's clients,"—although the guardians of the minor asked to be allowed to relinquish her selection and accept the same (R., 101, 102), and thereafter, of his own motion, fixed the price and value of such

relinquishment at $25,000 ($15,000 for the 30 acres selected by relator) and gave "Mr. Zevely's clients" four days within which to make payment therefor (R., 12, 13).

That the Secretary of the Interior did not even purport to predicate his action in reopening the case and attempting to vacate his previous decision of May 10, 1909, upon any supposed fraud or misrepresentation on the part of the relator or his privies plainly appears from the context of the orders of June 24 and June 30, 1909, to the Commissioner of Indian Affairs, directing the further proceedings to be held (R., 103, 104).

By his answer to relator's petition, which answer was filed in this cause on July 23, 1909, and prior to the issuance of the patent to Eva Waters, which is now relied upon to oust the jurisdiction of the appropriate courts, the respondent Secretary of the Interior, among other pertinent facts, admitted that Herman Knight was a citizen of the Cherokee Nation, by quantum of one-quarter Cherokee blood; that as such citizen of the Cherokee Nation he was entitled to an allotment of lands under the act of July 1, 1902; that on August 28, 1907, he had made application to the Commissioner to the Five Civilized Tribes at the Cherokee Land Office to take in allotment the land described in the petition for *mandamus;* that said land had been tentatively selected for the minor Eva Waters; that the question as to the right of the

class to which Eva Waters belonged to make selection at all was in litigation and undetermined; that on May 10, 1909, he had announced that he would "in due course of administration" and "in the absence of any facts which might thereafter develop to change such determination," award to said relator the right to select said land under the provisions of the act of Congress of July 1, 1902; that he had sent the telegram (above quoted) of May 11, 1909, to the Acting Commissioner to the Five Civilized Tribes; and that the Principal Chief of the Cherokee Nation had signed and executed "a deed of the land in controversy to the relator" and same had been forwarded by him to the Department of the Interior, but denied that he (respondent) had approved said deed, and averred that without such "approval said deed is insufficient to pass any title to the land in controversy either out of the Cherokee Nation as such or of the reversionary interest of the United States in said land" (R., 16); that he had refused to deliver said deed to relator and denied the existence of any duty upon him to deliver the same; that "upon announcing his permission that the contestee, Eva Waters might withdraw from the contest, he did state that, when relator had made full payment of the stipulated sum, he might then enter into possession, and that he, respondent, would direct issuance of patent or deed for the land in controversy" (R., 17); that under the rules of practice obtaining in the Department of the Interior thirty days are allowed

for the filing of motions for review and that within such period of time counsel for Eva Waters presented such a motion; that in permitting the withdrawal of Eva Waters, through her guardian, respondent had been moved so to do by the representation of relator's counsel "that the consideration offered was amply commensurate with the extent of her potential interest in said land" (R., 18); that Eva Waters had "protested against allowance of said withdrawal," claiming the same had "been induced by gross misrepresentations of the value of the land in controversy;" that counsel for relator "neither raised nor advanced any objection as to your respondent's complete jurisdiction" to entertain said motion for review, but appeared generally and endeavored by argument on the merits to induce denial of the same, but that afterwards, on June 24, 1909 (the patent having been forwarded to him by the Principal Chief on May 15—R., 98), "respondent being satisfied that the consideration offered for said withdrawal was inadequate, and that he had been misled in adjudging what the best interests of the Indian ward, said Eva Waters, required," he had vacated said order of May 10, 1909, and thereafter directed that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with and disposed of on its merits and directed "that the money deposited on behalf of relator should be returned to the party depositing it;" that "under the law relating to the allotment of lands

in the Cherokee Nation, the Commissioner to the Five Civilized Tribes is directed to issue allotment certificates as evidence of the right of an allottee to the land selected as his allotment as a step preliminary to the issuance of a deed or patent" (R., 19) thereto, and that no such certificate of allotment has ever been issued to said relator; that it is also provided by said law (sec. 59) that—

> "All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in this patent."

And that therefore "no deed or patent is valid or sufficient to pass title until approved by him and recorded in the office of the Commissioner to the Five Civilized Tribes;" that "until title passes he" (respondent) "has exclusive jurisdiction and control of all matters pertaining to such allotments;" that "his approval of such deed or patent is not a ministerial duty;" that "pursuant to his duty and his right he has refused to approve a deed of the lands herein in controversy to the said relator" (R., 19).

By replication the relator reiterated that on May 10, 1909, he was in lawful possession of the land in controversy and that on or about said date the Secretary, respondent, had authorized him to proceed through his tenants with the prosecution

of developments for oil and natural gas without waiting for the physical delivery to the said relator of a deed or patent to the land; that of the total sum of $25,000 the sum of $15,000 was to be attributed to the thirty (30) acres contested by relator (the 20 acres claimed by Twist are not involved in these proceedings); that relator "paid said sum ($15,000) to the Secretary of the Interior for the benefit of said minor, Eva Waters, and on May 13, 1909," * * * "erected on said land derricks and other machinery necessary for the drilling for oil and natural gas, and said derricks and machinery were on said land and the work was being prosecuted prior to and on May 24, 1909" (R., 26); that "said Secretary was not moved to the action taken by him in this regard upon (by) any representation made by counsel for relator, but was moved solely and entirely to the action taken by him by investigations conducted upon his own account;" that "after a full hearing, both by brief and oral argument," and by his "own investigation of the physical fact—having himself been on the premises in controversy—he" (the Secretary) * * * "demanded" * * * "the sum of $15,000" to be paid in consideration for the withdrawal of Eva Waters and the issuing to relator of a deed or patent for said land (R., 27, 34). Relator denied "that any misrepresentations of any character were made to the parent and guardian of Eva Waters as to the value of the land in

controversy," averred that "the money (so) deposited on behalf of relator has not been returned to him," and denied that he assented to further proceedings being had at the instance of respondent in connection with said lands, and averred that when the contest proceeding "was called for trial at Muskogee on the 16th day of July, 1909," * * * "by his counsel he protested against any further steps being taken touching said land, stating as the ground of said protest that the land had already been patented to your relator and that the jurisdiction of the Department of the Interior touching said land had ceased" (R., 28). That relator, "by the action of the Secretary of the Interior directing the Principal Chief to issue patent to him, became entitled and is entitled to have the same delivered," and averred that his application for allotment of these lands to himself, "as well as these proceedings for a writ of *mandamus*, have been and are maintained for his own benefit" (R., 28).

Upon the issue of fraud and misrepresentation so framed by the pleadings the burden of proving the existence of fraud or mistake was clearly laid on the Secretary, respondent. But no effort on his part was made to sustain the same. The depositions taken on behalf of relator satisfactorily negative the existence of any such, and respondent not only offered no proof in support of his charges, but objected to and prevented the consid-

eration of relator's proofs in opposition thereto by the trial and lower appellate court. What, then, were the lawful powers of the Secretary of Interior with respect to the duly executed patent purporting to vest title to the lands therein described in the relator Knight?

If under the terms of the act of July 1, 1902 (32 Stats. L., 716), and the circumstances surrounding this case the title to the lands in question passed to and vested in relator upon the execution and delivery to the Secretary by the Principal Chief of the Cherokee Nation of the patent to Knight, then it is clear that in the absence of fraud, misrepresentation or mistake neither the departmental nor other rules of practice with respect to motions for reviews or rehearings and fixing periods within which same may be filed have any bearing on or place in this case.

In the opinion of the Court of Appeals it is stated that relator "admits in his petition that under the rules of practice obtaining in the Department of the Interior in Indian affairs thirty days are allowed from and after notice of a decision within which to file a motion for rehearing or review," while in the motion to dismiss, quoting from the 13th paragraph of the answer, it is stated that the averment of respondent to above effect was "not denied or traversed by the replication," and (p. 14) "The admission by petitioner that un-

der the rules and regulations of the Department of the Interior Eva Waters had the right to file a motion for review, &c., carries the conclusion that the Secretary of the Interior still had jurisdiction and control of the controversy."

Neither statement is correct, and *par consequence* the deduction therefrom is unfounded.

The petition contains no such admission, and petitioner's replication (Extracts, &c., p. 34), responding to paragraph fourteen of respondent's answers, expressly denied the jurisdiction of the Secretary of the Interior to proceed further with the contest proceedings subsequent to the execution of the deed for said land by the Principal Chief; and averred that when said contest case was called for trial at Muskogee "then and there by his counsel he protested against any further steps being taken touching said land, stating as the grounds of said protest *that the land had already been patented to your relator and that the jurisdiction of the Department of the Interior touching said land had ceased*" (R., 28).

In the matter of "Oil and Gas Leases Nos. 22,566 and 22,601," involving the disposal of several leases of Eastman Richards, a full-blooded Creek, upon his allotment of 160 acres, a controversy between two claiming to be lessees of the same lands had been resolved in favor of one on ground of priority, and motion to reconsider this action was filed.

First Assistant Secretary Samuel Adams, on December 9, 1912, in a communication to the Commissioner of Indian Affairs, declined to entertain the motion, saying: "The regulations do not provide for such a motion in reference to the approval of leases."

Relator's contention now, as it has always been, is that by the payment and receipt of the $15,000 demanded by the Secretary and the execution and delivery by the Principal Chief, acting under his express direction, of the deed or patent covering the land, the title to such land vested in relator and there was then left to the Secretary of Interior under the law, the purely ministerial duty of delivering said deed or patent to relator for recordation, after notation of the Secretary's "approval" thereon.

The Court of Appeals met this contention by citing Goldsby's and Frost's cases (*ubi post*), observing with reference thereto that—

> "the United States Supreme Court held (therein) that the issuance and delivery of an allotment certificate by the Commission to the Five Civilized Tribes was the act which made the right to a patent for any designated allotment complete."

And that—

> "Before the issuance and delivery of such allotment certificate, there is still jurisdic-

> tion to refuse the patent. After its issuance and delivery the delivery of the patent becomes a ministerial act,"

concluding that as no allotment certificate had ever been issued to relator in this case, the Secretary "was acting within his lawful jurisdiction in refusing to deliver said patent to" him.

But the conclusion thus expressed presents a familiar example of *non sequitur*, for it ignores the possibility of the vesting of title in allottees otherwise than by the formal and physical issuance of such a certificate.

As relator's legal right to relief by mandamus, if any he has, is based squarely upon the proposition that in the exercise of their legitimate functions under the powers conferred upon them by said act of July 1, 1902, both the Commissioner to the Five Civilized Tribes and the Secretary of Interior had so acted as to render the execution and delivery of a certificate of allotment unnecessary, it becomes necessary to re-examine the provisions of the act and the opinions of this court in the cases cited, in order to ascertain what if any administrative function involving the exercise of judgment or discretion with respect to the passing of title to this land, inhered or remained to or in the Secretary of Interior after the Principal Chief of the Cherokee Nation, acting in strict pursuance of the concurring conscious and intended directions and orders of both of such officials, had signed, sealed. and forwarded to the Secretary for "approval" and delivery the deed or patent in question.

The act of July 1, 1902 (32 Stats. L., 716, ch. 1375), is intitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes."

Sections 1 to 8, inclusive, of said act prescribe definitions for various words and phrases contained therein, among others that the words "principal chief" or "chief executive" shall be held to mean the principal chief of said (Cherokee Nation or) tribe; that the words "Dawes Commission" or "Commission" shall be held to mean the United States Commission to the Five Civilized Tribes; that the word "minor" shall be held to mean males under twenty-one and females under eighteen years of age; the word "select" and "its various modifications, as applied to allotments and homesteads, shall be held to mean *the formal application at the land office"* (italics ours), "to be established by the Dawes Commission, * * * for particular tracts of land; words importing the masculine gender apply to females as well, and plurals include the singular, and *vice versa."*

Section 9 provides for an appraisement of the allottable lands of the Cherokee Nation, to be made "by the Commission to the Five Civilized Tribes" (section 10), and declares that in determining the value of allottable lands no consideration is to be given to the location thereof, nor to any timber that may be thereon, nor to any mineral deposits

contained therein, nor to improvements located thereon.

"SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

"SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

"SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands."

Sections 25, 26, and 27 provide for the enrollment of Cherokee citizens.

"SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act." * * *

"SEC. 58. The Secretary of the Interior shall furnish the Principal Chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, *or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the Principal Chief shall thereupon proceed to execute and deliver to him a patent* conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate" (italics ours).

"SEC. 59. All conveyances *shall be* approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent" (italics ours).

"SEC. 60. Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment."

"SEC. 61. The acceptance of patents for minors and incompetents by persons authorized to select their allotments for them shall be deemed sufficient to bind such

minors and incompetents as to the conveyance of all other lands of the tribe."

"SEC. 62. All patents, when so executed and approved, shall be filed in the office of the Dawes Commission, and recorded in a book provided for the purpose, until such time as Congress shall make other suitable provision for record of land titles, without expense to the grantee, and such records shall have like effect as other public records."

"SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior."

"SEC. 69. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor."

"SEC. 70. Allotments may be selected and homesteads designated for minors by the father or mother, if citizens, or by a guardian, or curator, or the administrator having charge of their estate, in the order named; * * * but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties."

Herman Knight was a duly enrolled Cherokee citizen of mixed blood—less than one-half by quantum Cherokee blood, and entitled to apply for and receive in ordinary course of disposition and administration the lands covered by the patent in

question as a portion of the total allotment of lands of the Cherokee Nation to which he was entitled under the act of July 1, 1902.

By section 1 of the act of May 27, 1908 (35 Stats. L., 312), all lands allotted to him under the provisions of the act of 1902 were absolutely freed from all restrictions of whatever nature (Goat *vs.* United States, 224 U. S., 458; Deming Investment Co. *vs.* United States, *ib.*, 471).

By section 22 of the act of July 1, 1902, exclusive jurisdiction "to determine all matters relative to the appraisement and allotment of" such lands is in the Commission to the Five Civilized Tribes. "under the direction of the Secretary of the Interior."

In Knight *vs.* United Land Ass'n, 142 U. S., 161, this court said:

> "The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. * * *
>
> "*Such supervision may be exercised by direct orders or by review on appeals.* The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are be-

> fore the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary."

By section 21 the "allotment certificates" issued by the Commission are made "conclusive evidence of the right of an allottee to the tract of land described therein," but by section 58 the Principal Chief is required not only to execute and deliver patents "conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens in and to the lands embraced in" allotment certificates to the holders of such certificates, but he is likewise required to execute and deliver such patents to non-holders of allotment certificates whenever "any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed."

By section 59 the Secretary of Interior is in duty bound and without any discretionary powers—"shall"—to approve all such conveyances and such approval operates as a relinquishment to the grantee of the right, title and interest of the United States in and to the land described therein.

It is evident from the foregoing that prior to the execution and delivery of the patent for any

particular allotment by the Principal Chief, the Secretary of Interior has no duty to perform other than that of general direction with respect to any matter pertaining either to the appraisal or allotment of such land, for exclusive jurisdiction in such respect is expressly conferred upon the Commission; and it is equally as evident that after the patent has been executed and delivered by the Principal Chief, the Secretary has no function to perform with respect thereto, other than the mandatory function, involving neither judgment or discretion, of noting his "approval" on the patent or conveyance so executed.

The circumstance that in furthering the convenience of allottees and possibly of expediting the despatch of the business the patents may have been sent by the Principal Chief direct or through the Commission to the Five Civilized Tribes to the Secretary for his approval instead of being delivered by the Principal Chief to the allottees, as the law prescribes, is but fortuitous, and cannot affect or in anywise alter the right of the allottee to demand from the Secretary both his "approval" and the consequent delivery of the patent.

Under the circumstances of the case at bar the patent executed and delivered by the Principal Chief at the instance and by instruction of the Commission to the Five Civilized Tribes, after full consultation with, and pursuant to the direction of the Secretary of the Interior, served the double

purpose of an allotment certificate and of a conveyance of the lands described therein. The law does not prescribe the form of allotment certificates, and the Secretary's telegram of May 11, 1909, acquiesced in as it was by the Commission, was the equivalent of an allotment certificate, if it did not in fact constitute one. In any event, the acceptance of the $15,000, fixed by the Secretary himself, as the price for clearing the record of the more than doubtful claim of the minor Eva Waters, and the simultaneous execution and delivery of the formal patent,—an instrument of higher dignity than the allotment certificate,—would seem to have rendered the issuance of a more formal certificate unnecessary.

The very letter of section 58 of the above-mentioned act negatives the idea that the right of an allottee to receive a patent can only become fixed by the prior issuance to him of an allotment certificate. By that act it is made the duty of the Principal Chief to execute and deliver patents when the citizen allottee has received "his allotment of land," evidenced perhaps by exhibition of the allotment certificate therefor, and also *"when any allotment has been so ascertained and fixed that title should, under the provisions of this act, be conveyed."* It would seem to be difficult, if not impossible, to maintain, in the case at bar, that the allotment selected by Knight and relinquished by the parents of the minor Waters, had not be-

come so ascertained and fixed that patent should be issued therefor.

The case at bar in principle seems quite clearly to be ruled by the case of Ballinger *vs.* U. S. *ex rel.* Frost, 216 U. S., 240, wherein this court affirmed the judgment of the Court of Appeals, which in its turn had affirmed a judgment of the Supreme Court of the District of Columbia granting a mandamus requiring the Secretary of the Interior to deliver or cause to be delivered a patent to an Indian allottee, under circumstances less favorable to the allottee than those disclosed by the present case.

Frost was a citizen and resident of the Choctaw Nation, entitled to an allotment of the lands of that Nation under the act of Congress of June 28, 1898 (30 Stats. L., 495, ch. 517), which provided for such allotments "under the direction of the Secretary of the Interior" and also provided "that as soon as practicable after the completion of said allotment, the Principal Chief of the Choctaw Nation and the governor of the Chickasaw Nation should jointly execute, under their hands and the seals of their respective nations, and deliver to their allottees, patents conveying to them all the right, title, and interest of the Indians in and to the lands allotted.

Frost having selected the lands there in dispute; and nine months having elapsed without any contest against her selection having been initiated, a

certificate of allotment was issued to her and thereafter the Principal Chief of the Choctaw Nation and the governor of the Chickasaw Nation executed under the seals of their respective nations a patent for the lands embraced therein.

The act of July 1, 1902 (32 Stat. L., 641, ch. 1362), ratifying the indicated agreement between the Choctaws and the Chickasaws, and providing in detail for the allotment and conveyancing of the allottable lands was very similar in terms to the act of the same date (32 Stat. L., 716, ch. 1375), providing for the allotment of the lands of the Cherokee Nation,—sections 23 and 24 of the former act being practically identical with sections 21 and 22 of the latter.

After the execution of the patent to Frost, the Secretary, for reasons satisfactory to himself, and no doubt equally potent with those supposed to have existed in the case at bar, directed the cancellation of Frost's allotment "with leave to select other lands to fill her right to tribal lands in severalty." The patent that had previously been issued to her was returned and remained on file in the office of the Commissioner of Indian Affairs, to be cancelled" (p. 248).

This court, speaking through Mr. Justice Brewer, said:

> "The Interior Department has general control over the affairs of the Indians, wards of the Government. In addition, the Secretary of the Interior was, by these several acts, specially charged with the duty

> of supervising the action of the Commission to the Five Civilized Tribes in making the allotments authorized by these acts. On both of these grounds he claims authority to have done what he did, and that his acts in that respect are not subject to review by the courts."

But after citing and quoting from Cornelius *vs.* Kessel, 128 U. S., 456, 461, and Orchard *vs.* Alexander, 157 U. S., 372, 383, the Court said:

> "Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior. * * * However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation,"

and noting that in the case then under discussion "the title of the allottee to the land selected" had become fixed, "and the chief authorities of the Choctaw and Chickasaw nations (had) executed to her a patent" therefor, the court declared that—

> "Thereafter the Secretary of the Interior had nothing but the ministerial duty of seeing that a (the) patent was * * * delivered."

As in Frost's case so in the case at bar, the authorities especially and exclusively empowered by

the pertinent acts of Congress had executed under the great seal of the Cherokee Nation a patent for the lands embraced therein to Knight.

As in Frost's case so in the case at bar nothing remained to be done by the Secretary but the purely perfunctory and ministerial duty of noting his "approval" thereon and seeing that it was duly delivered to the patentee.

To like effect in general, and equally forceful, are the opinions of this court in—

Garfield *vs.* U. S. *ex rel.* Goldsby, 211 U. S., 249.

Roberts *vs.* United States, 176 U. S., 221.

Noble *vs.* Union River Logging Co., 147 U. S., 165.

Frasher *vs.* O'Connor, 115 U. S., 112.

Butterworth *vs.* U. S. *ex rel.* Hoe, 112 U. S., 50.

United States *vs.* Schurz, 102 U. S., 378.

Barney *vs.* Dolph, 97 U. S., 652.

In view of the circumstances and particularly in view of the large sums of money paid to and remaining in the possession of the Commission to the Five Civilized Tribes for the benefit of the minor Eva Waters, and the other large sums expended upon the strength of the Secretary's decision of May 10, 1909, and his telegram of instructions of May 11, 1909, in improving and developing the lands by erecting derricks and drilling for oil, it

would seem that the present case, while equally as strong in point of law as any one of the cases above cited, excels them all in that strength which equities and good faith and conscience inevitably add.

It will be noted that section 58 declares that the patent executed by the tribal chief is one "conveying all the right, title, and interest *of the Cherokee Nation, and of all other citizens* in and to the lands embraced in his allotment certificate;" also that the effect of the Secretary's approval "shall serve as a relinquishment to the grantee of all the right, title, and interest *of the United States* in and to the lands embraced in his patent." To be sure the patent signed by the tribal chief would be void unless it follows an allotment certificate by the Commission or unless it follows the other lawful "ascertainment and fixing" of the allotment, either of which would be a proper authority for the patent and either of which is conclusive of the right to a patent, leaving the issuance of the patent a mere ministerial duty.

It is clear that while the agreement contemplates that the tribal chief shall sign the patent and the Secretary shall endorse his approval thereon, each signature performs a separate office. The execution of deed by the tribal chief when done pursuant to allotment certificate or other "ascertainment and fixing" of the allotment *conveys the title of the Cherokee Nation and all other citizens,* without the formality of the Secretary's approval, and the

adding of the latter's approving signature relinquishes any claim of the United States. The agreement contemplates that when the tribal deed is properly executed pursuant to authority the Secretary's approval follows *pro forma.*

We submit with respect and great deference that the action of the Secretary of the Interior, after his offer to permit relinquishment by the minor, Eva Waters, and selection by the adults, Twist and Knight, had been accepted by the payment by or in the interest of the latter of the aggregate sum of $25,000.00, in attempting to reopen the proceeding for the sole purpose of giving a defeated and disappointed bidder an opportunity to overbid his successful opponent, savors of the exercise of that arbitrary power with respect to which it was said in Garfield, Secretary, *vs.* Goldsby, 211 United States, 249, 262:

> "We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to

restore the status of the parties aggrieved by such unwarranted action.

"In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

"The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

It would seem to be quite certain that if withholding by the Secretary of the Interior of his "approval" and of the recordation of patents issued pursuant to a certificate of allotment could not have the effect of preventing the vesting in the allottee of title to the lands described in such certificate, then it would likewise seem with equal and even greater force that where the right in a competent enrolled Cherokee citizen to any particular allotment had "been so ascertained and fixed that title should under the provisions of this act (July 1, 1902) be conveyed," and the Principal Chief of the Nation acting under and in pursuance of direct instructions from the Secretary of the Interior through the Commissioner to the Five Civilized

Tribes has fully executed and delivered to an intermediary for ultimate delivery to the allottee an appropriate patent or deed therefor, the refusal thereafter on the part of said Secretary either to approve, record or deliver to the allottee such patent or deed could not have the effect either of preventing the vesting in the allottee of title nor could the issuance to another of a junior patent or deed covering the same lands have the effect of divesting the title of the original allottee.

The foregoing discussion would seem to sufficiently cover the points sought to be raised by Assignments of Error Nos. 1, 2 and 3, and further prolongation of the discussion of the merits of this cause would seem to be both undesirable and probably unnecessary.

The Plea Puis Darrein Continuance.

Under assignment of error numbered four it is suggested that upon settled principles of pleading and practice the filing by respondent of his "Supplemental Answer," which was in effect and to every intendment but a plea *puis darrein continuance,* constituted an abandonment of all prior pleas and defenses interposed by him in the cause. Such effect and result of his plea could not be formally avoided by the inclusion in the plea of phrases intended to preserve of record prior pleas and defenses while at the same time claiming the

added benefit of the latter one, which depended for its efficacy upon an act performed subsequent to the initiation of the suit.

It is elemental at common law and the rule has not been altered by the law or practice in force in the courts of the District of Columbia that a plea *puis darrein continuance* supersedes all other pleas and defenses previously filed in the cause. On the record, in such cases, the cause of action is admitted to the same extent as would have occurred if no other defense than that contained in the plea *puis* had been submitted.

Yeaton *vs.* Lynn, 5 Peters, 224, 231.
Wallace *vs.* McConnell, 13 Peters, 136, 152
Wisdom *vs.* Williams, Fed. Cases, 17, 904.
Scott *vs.* Brokaw, 6 Blackford, 243.

In the case last cited it was held that where, as in the case at bar, such plea is bad in itself, the opposite party is entitled to judgment.

It has been said that this rule proceeds upon the hypothesis that the party filing such plea assumes a new ground of defense to the action, and abandons all defenses theretofore relied upon; and again, that such plea in fact, strikes from the record, *by operation of law,* all previous pleas and everything stands confessed except the matter contested by the plea *puis.*

Angus *vs.* Chicago Trust, &c., Co., 170 Illinois, 298.
Waterbury *vs.* McMillan, 46 Mississippi, 635.

The rule as thus stated seems to be well settled in England,

Bacon's Abridg. Pleas & Pl., 2;
Barber *vs.* Palmer, 1 Ld. Raym., 693;
Vaughan *vs.* Brown, 2 Stra., 1106,

and to be supported by the practically unbroken line of decisions in Alabama, Arkansas, Illinois, Indiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Wisconsin, and, perhaps, of other States.

The Court of Appeals having resolved the issue on the plea *puis darrein continuance* in favor of relator and against respondent, in consequence of the law and established practice applicable to the situation should have reversed the judgment of the Supreme Court of the District of Columbia and remanded the case to that court with an instruction to award peremptory mandamus.

With respect to so much of respondent's motion to dismiss or affirm as suggests that this is a moot case because of the alleged actions of the Secretary of the Interior subsequent in date to the institution of these proceedings, it would seem to be only necessary to add to what has been said above that beyond the matter of the issuance of the patent in favor of Eva Waters, which was imported into the case by the respondent's "Supplemental Answer," nothing further is contained in the record before this court.

With respect to so much of the motion to dismiss as predicates ground for such action upon the absence from the record of any bill of exceptions it would seem to be sufficient to say that there is no law or practice prevailing in the courts of the District of Columbia, or at common law, requiring the presence of a bill of exceptions to preserve, for purposes of review, points of law raised in the orderly course of proceedings in mandamus. The cases of Michigan Insurance Bank *vs.* Eldred, 143 U. S., 293, and Jennings *vs.* P., B. & W. R. R. Co., 218 U. S., 255, have no application to and afford no guide for decision as to the proper practice to be followed in such cases. If it were otherwise, still Point III would not be well taken, for it is settled that when the point of law to be reviewed is apparent in or upon the record, as where the judgment or decree of the lower court itself presents the point or matter complained of and upon which the court acted, no bill of exceptions is necessary to preserve it.

Insurance Co. *vs.* Piaggio, 16 Wallace, 378.

Clinton *vs.* Missouri Pac. Ry., 122 U. S., 469.

City of Wilmington *vs.* Ricaud, 90 Fed. Rep., 221.

In the case at bar the decree itself evidences the relator's offer "to read in evidence the depositions (identifying them by their marks) heretofore taken and filed in this cause"; the refusal of the

court "to admit said depositions to be read in evidence," and the noting by the court of relator's exception to such ruling. It also evidences respondent's offer in evidence of the "patent to the land in controversy issued as set forth in the supplemental answer of the respondent" and relator's objection thereto; the admission by the court of said patent in evidence and the exception by relator to the court's ruling in such regard (R. 116).

It would seem both upon principle and authority that the points of law so raised have been not only properly but sufficiently preserved for all purposes.

Conclusion.

Upon the whole case it is respectfully submitted that the judgment of the Court of Appeals of the District of Columbia in this case should be reversed and the cause remanded to that court with an instruction to reverse the judgment of the Supreme Court of the District of Columbia and to issue the peremptory writ of mandamus as prayed.

FREDERIC D. MCKENNEY,
JAMES W. ZEVELY,
JAMES M. GIVENS,
RICHARD WM. STOUTZ,
Attorneys for Plaintiff in Error.

INDEX.

	Page.
ADDRESS	1
THE CASE	1–12
(1) **The parties**—	
(*a*) Relator is Herman Knight, an enrolled mixed-blood Cherokee Indian	1
(*b*) Defendant is Walter L. Fisher, Secretary of the Interior	1
Act of July 1, 1902 (32 Stat. 716)	1
(2) **The purpose of the suit**—	
(*a*) To compel the defendant by mandamus to record and deliver to relator a certain deed to real property	2
(3) **The facts**—	
(*a*) The history of and quotations from the legislation involved	2–6
Gritts v. *Fisher*, 224 U. S. 640, 642.	
Cherokee Nation v. *Hitchcock*, 187 U. S. 294, 306.	
Heckman v. *United States*, 224 U. S. 413, 435.	
Treaty of July 19, 1866 (14 Stat. 799).	
Act, October 19, 1888 (25 Stat. 609).	
Act, March 2, 1889 (25 Stat. 994).	
Act, October 1, 1890 (26 Stat. 636).	
Act, March 3, 1893 (27 Stat. 640).	

THE CASE—Continued.
(3) **The facts**—Continued.
(*a*) The history of and quotations from the legislation involved—Continued. Page.
Act, June 10, 1896 (28 Stat. 321).
Act, June 28, 1898 (30 Stat. 502).
Act, July 1, 1898 (30 Stat. 591).
Act, May 31, 1900 (31 Stat. 221).
Act, March 31, 1901 (31 Stat. 1073).
Act, July 1, 1902 (32 Stat. 716).
Act, April 26, 1906 (34 Stat. 137).
Sec. 5, Act, April 26, 1906, *supra*.
Act, June 21, 1906 (34 Stat. 342).
Act, May 27, 1908 (35 Stat. 312).
(*b*) Proceedings before the Secretary of the Interior 6–12
25 Ops. Atty. Gen. 460, 464.
West v. *Hitchcock*, 205 U. S. 80, 85, 86.
Ballinger v. *Frost*, 216 U. S. 240, 248.
Act, July 1, 1902, *supra*.
Gritts v. *Fisher*, *supra*.
Sec. 60, Act, July 1, 1902, *supra*.
(*c*) The contention of relator 12–13
ARGUMENT 13–34
(1) **No jurisdiction in the courts to interfere by mandamus**—
(*a*) Congress has conferred upon the Secretary of the Interior full and exclusive jurisdiction in the allotment of lands among the qualified members of the Five Civilized Tribes. The exercise of this duty and jurisdiction involves the exercise of judgment and discretion. A decision of an executive officer made in

ARGUMENT—Continued.

(1) **No jurisdiction in the courts to interfere by mandamus**—Continued. Page.

the discharge of a duty imposed by such laws and involving the exercise of judgment and discretion may not be reviewed by mandamus, nor can he be compelled by that means to retract his decision so made, and to give effect to another not his own and having his approval..... 13–19

United States ex rel. *Ness* v. *The Secretary of the Interior*, 223 U. S. 683.

West v. *Hitchcock*, *supra*.

Ballinger v. *Frost*, *supra*.

(*b*) The United States has a reversionary interest in the lands of the Cherokees. While this title remains in the United States and the proceedings for acquiring it are still *in fieri*, the courts are without power by mandamus or otherwise to control the judgment and discretion of the Secretary of the Interior in respect of the disposition of such lands under the public-land laws..... 19

Act, May 28, 1830 (4 Stat. 411).

Sec. 59, act, July 1, 1902, *supra*.

Heckman v. *United States*, *supra*.

United States v. *Schurz*, 102 U. S. 378, 396.

Knight v. *Land Association*, 142 U. S. 161.

Brown v. *Hitchcock*, 173 U. S. 433, 476–8.

U. S. ex rel. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316.

Oregon v. *Hitchcock*, 202 U. S. 60.

Naganab v. *Hitchcock*, 202 U. S. 472.

ARGUMENT—Continued.

(1) **No jurisdiction in the courts to interfere by mandamus**—Continued. Page.

(*c*) United States is an indispensable party and the courts have no jurisdiction. 19

Oregon v. *Hitchcock*, *supra*.

Naganab v. *Hitchcock*, *supra*.

Heckman v. *United States*, *supra*.

(2) **Deed of principal chief of no avail**—

(*a*) The deed has never been approved by the Secretary; it was never recorded nor delivered. No allotment certificate has ever issued to relator. Relator has not, nor is he entitled to, either legal or equitable title... 20–22

Ballinger v. *Frost*, 216 U. S. 240.

Sec. 59, Act of July 1, 1902, *supra*.

Sec. 5, Act of April 26, 1906, *supra*.

(*b*) *Ballinger* v. *Frost*, *supra*, distinguished..... 20–22

United States ex rel. Lowe v. *Fisher*, 223 U. S. 95.

Harvey v. *Diller*, 178 U. S. 476, 490.

Lowe v. *Ballinger*, 35 App. Cas. D. C., 524.

(3) **A moot case**—

Act of May 27, 1908 (35 Stat. 312)..... 23

(*a*) The lands in controversy were duly patented to Eva Waters; she thus obtained an absolute and unrestricted title thereto and removed the land from the jurisdiction or control of the United States or any officer thereof; there is nothing for a judgment in favor of relator to operate upon..... 23

ARGUMENT—Continued.

(3) **A moot case**—Continued. Page.

(*b*) Relator himself, after the commencement of the action, took an allotment of other lands in full satisfaction of his right 23

(*c*) Relator is estopped 23

(4) **The supplemental answer**—

(*a*) Defendant did not abandon his prior main defense by the filing of the supplemental answer 23–29

(*b*) In mandamus in the District of Columbia the ordinary pleading is inapplicable 24

(*c*) There is no inconsistency between the original and the supplemental answers 25

(*d*) There is no basis whatever for this point, for the reason that the supplemental answer stated a defense "in addition to" the former defense, and all matters in the original pleadings were reiterated, reaffirmed, and reasserted 27

(*e*) The supplemental answer contains other material facts of which relator does not complain, and with relator's petition sets forth enough to sustain the judgment of the lower court 28

U. S. ex rel. West v. *Hitchcock*, 19 App. D. C. 333.

Act July 1, 1902, *supra*, secs. 58–62.

Act April 26, 1906, *supra*, sec. 5.

Statute of 9 Anne, ch. 20.

Rule 32, Rules of Practice, Supreme Court of the District of Columbia.

ARGUMENT—Continued.

(5) **Impossibility of performance**— Page.

(*a*) It is not a question of *impossibility* of performance; it is the *futility* of performance. The writ being discretionary, the court must consider its usefulness. It will not go where there is no necessity and when it would be ineffectual. It will not be granted to enforce a mere abstract right where practically no benefit would result to the party seeking the remedy 29

25 Cyc. 147.

High Extra. Rem., 3d ed., sec. 14.

Spelling, Inj. and Extra. Rem., 2d ed., secs. 1377, 1439.

U. S. ex rel. Turner v. *Fisher*, 222 U. S. 204, 209.

(*b*) If relator has no title the court should not interfere; if he has title the court need not interfere to order the doing of a vain thing 32

(6) **Eva Waters an indispensable party**—

(*a*) The title has passed to Eva Waters. Her title is unrestricted, and she may have conveyed the land. She and her grantees, if any, are indispensable parties to the suit 33

Act May 27, 1908 (35 Stat. 312).

Shields v. *Barrow*, 17 How. 130.

Cairon v. *Millaudon*, 19 How. 113.

ARGUMENT—Continued.

(7) **The land and the remedy is in Oklahoma**—

Page.

(*a*) Mandamus will not issue if there is another effective remedy to insure relator the enjoyment of his alleged right. Relator claims that the action of the Secretary resulted in passing the title to him. He wants the land, and not the naked deed. The place to secure it is in Oklahoma, and the way is not a proceeding in the District of Columbia for a writ of mandamus 33–34

CONCLUSION:

(1) The motion to dismiss or affirm should be granted 34

(2) The judgment should be affirmed 34

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 163.

THE UNITED STATES OF AMERICA ON THE RELATION OF HERMAN KNIGHT, *Plaintiff in error,*

vs.

WALTER L. FISHER, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, *Defendant in error.*

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

This case is before the court on writ of error to the Court of Appeals of the District of Columbia, involving the merits of the controversy between the parties, and on a motion to dismiss or affirm. The motion to dismiss or affirm was heretofore submitted to the court, but consideration and decision thereof was by the court continued until the case was submitted on the merits.

THE PARTIES.

The relator is Herman Knight, an enrolled mixed-blood Cherokee, having one-quarter Indian blood and entitled to an allotment of land under the act of July 1, 1902 (32 Stat. 716).

The party defendant is Walter L. Fisher, Secretary of the Interior.

THE PURPOSE OF THE SUIT.

The purpose of the suit is to compel the defendant by mandamus to properly record a certain deed and deliver the same to relator; in effect, to make an allotment of land to relator and record and issue to relator a patent or deed therefor.

THE FACTS.

The questions involved arise out of certain proceedings had and taken before the Secretary of the Interior under certain acts of Congress respecting the Five Civilized Tribes, and particularly the Cherokees. In regard to this legislation this court said in *Gritts* v. *Fisher*, 224 U. S. 640, 642:

> During the last twenty years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, of which the Cherokee tribe is one, among their respective members and to the dissolution of the tribal governments. An extended statement of these laws, so far as they concern the Cherokees, as also of the title by which their lands and funds have been held and of the relations of the tribe and its members to the United States, will be found in *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitckcock*, 187 U. S. 294; *Cherokee Intermarriage Cases*, 203 U. S. 76; *Lowe* v. *Fisher*, 223 U. S. 95; and *Heckman* v. *United States*, *ante*, p. 413.
>
> Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as ten-

ants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible. And when children were born into the tribe they became thereby members, and entitled to all the rights incident to that relation. Under treaties with the United States the tribe maintained a government of its own, with legislative and other powers, but this was a temporary expedient, and in time proved inefficient and unsatisfactory. As in the instance of other tribal Indians, the members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds among them, and to terminate the tribal government. This Congress undertook to do. The undertaking was a large one, and difficulties were encountered. The first legislation was largely preliminary and experimental, and need not be specially noticed, because no material change in the situation resulted therefrom.

The legislation prior to 1902 referred to by the court will be found in the following acts:

Treaty of July 19, 1866 (14 Stat. 799); act of October 19, 1888 (25 Stat. 609); act of March 2, 1889 (25 Stat. 994); act of October 1, 1890 (26 Stat. 636); act of March 3, 1893 (27 Stat. 640);

act of June 10, 1896 (28 Stat. 321); act of June 28, 1898 (30 Stat. 502); act of July 1, 1898 (30 Stat. 591); act of May 31, 1900 (31 Stat. 221); act of March 31, 1901 (31 Stat. 1073).

> By this legislation the United States practically assumed full control over the Cherokees, as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306. *Heckman* v. *United States*, 224 U. S. 413, 435.

This brings us to the act of July 1, 1902 (32 Stat. 716), which related only to the Cherokees and is spoken of as the Cherokee agreement, because it was in the following August ratified and adopted by the Cherokee Nation as a means and method of enrollment of its members and allotment and disposition of its property and funds. Its provisions were comprehensive. It dealt with the whole subject matter. It is referred to at length in *Gritts* v. *Fisher*, *supra*, p. 643, immediately following that portion of the opinion above quoted.

This act was followed by the act of April 26, 1906 (34 Stat. 137), the act of June 21, 1906 (34 Stat. 342), and the act of May 27, 1908 (35 Stat. 312).

It is under these acts of 1902, 1906, and 1908 that relator makes his claim and upon the provisions of which he relies.

This legislation is referred to and discussed in the various cases cited by this court in *Gritts* v. *Fisher*, *supra*.

The following sections are taken from the act of July 1, 1902, *supra:*

> SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.
>
> SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.
>
> SEC. 59. All conveyances shall be approved by the Secretary of the Interior which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

By section 5 of the act of April 26, 1906, *supra*, it is provided:

> And all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of

> the Commissioner to the Five Civilized Tribes, and when so recorded shall convey the legal title and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same.

These various acts of Congress and sections 441 and 463 of the Revised Statutes imposed upon the Secretary of the Interior supervisory power over the matters and things therein contained and the duty and jurisdiction of administering and executing them. This is apparent from a consideration of the legislation and has been so held: 25 Ops. Atty. Gen. 460, 464; *West* v. *Hitchcock*, 205 U. S. 80, 85, 86; *Ballinger* v. *Frost*, 216 U. S. 240, 248.

And this duty and jurisdiction of the Secretary of the Interior involves the exercise of judgment and discretion—functions clearly judicial in their nature.

Pursuant to the act of July 1, 1902, *supra*, relator, on August 28, 1907, made application to the Commissioner to the Five Civilized Tribes for an allotment to him of certain lands (R., 2). It appeared that, theretofore, to wit, on August 21, 1907, an application had been made for an allotment of the same land on behalf of Eva Waters, also a mixed-blood Cherokee enrolled as such (R., 2). She was a minor, born between September 1, 1902, and March 4, 1906 (R., 11), and entitled to an allotment *Gritts* v. *Fisher*, 224 U. S. 640.

Under the rules of practice in such cases it became necessary for the relator, if he desired to go any further, to file a contest against the application of

Eva Waters, which he did on August 28, 1907 (R., 2). Under these rules of practice such contests are heard and decided in the first instance by the Commissioner to the Five Civilized Tribes, and may then be appealed to the Commissioner of Indian Affairs, and from his decision appealed to the Secretary of the Interior (R., 2).

There were 50 acres of land in the selection of Eva Waters. Relator's application was for 30 acres of land, and at the time he filed his application one Twist also filed application and contest for the remaining 20 acres (R., 11).

The case of *Twist* v. *Waters* was tried before the Commissioner to the Five Civilized Tribes, and he rendered judgment in favor of Twist. Waters appealed to the Commissioner of Indian Affairs, who reversed the judgment of the Commissioner to the Five Civilized Tribes and decided in favor of Waters. Thereupon, Twist appealed to the Secretary of the Interior. The case of *Knight* v. *Waters* (relator's contest) in the meantime was not tried (R., 11).

While the case of *Twist* v. *Waters* was thus pending before the Secretary for consideration, it was represented to him that Waters, through her guardian, desired to withdraw from the contest and to allow a judgment against her by default as to this particular land upon the payment to her of a certain sum of money by the contestants (R., 12, 18); relator's counsel represented to the Secretary that the consideration offered was amply commensurate with the extent of the potential interest of Waters in the land

(R., 18). The Secretary thereupon concluded to allow Waters thus to withdraw, and in that behalf made his decision of May 10, 1909, which will be found in the record, pages 11–13. On May 11, 1909, the Secretary sent to the Acting Commissioner to the Five Civilized Tribes the telegram found on page 3 of the record. After the receipt of said telegram, the principal chief of the Cherokee Nation executed a deed of the land in controversy to the relator and the same was forwarded to the department; but the Secretary has never approved the deed and has never recorded or delivered it to the relator (R., 16). No certificate of allotment has ever issued to relator for this land (R., 19).

It is upon this action of the Secretary of May 10, 1909, and May 11, 1909, and the execution of the deed by the chief of the Cherokee Nation that relator relies, and upon which he bases his contentions.

The merits of the controversy in *Twist* v. *Waters* were not considered nor decided, and the case of *Knight* v. *Waters* (relator's contest) still remained pending and untried before the Commissioner to the Five Civilized Tribes (R., 11, 18, 27).

Shortly after the Secretary's decision of May 10, 1909, *supra*, the parent and guardian of Waters protested by telegram to the Secretary against the allowance of the withdrawal, complaining that their consent thereto had been induced by gross misrepresentation of the value of the land in controversy (R., 18).

Under the said rules of practice, any person dissatisfied with the judgment in his case may, within 30 days thereafter, move for a rehearing or a review of the case (R., 9, 10). Waters took advantage of this rule and, in due time, properly filed a motion for rehearing or review (R., 18). On this motion for rehearing relator, through his counsel, appeared generally and "neither raised nor advanced any objection to your respondent's complete jurisdiction in the premises or to his proceeding to entertain and give consideration to said motion for review; that by brief and argument said relator by his counsel appeared in opposition to the contentions, mainly as to the facts, made in behalf of said Eva Waters, and sought, not by plea or objection to the authority or jurisdiction of respondent, but upon the merits, to induce denial of the said motion to review and reconsider the action of May 10, 1909." (R., 18).

On June 24, 1909, after having given careful consideration to the motion for review and the arguments and briefs presented by relator, the Secretary vacated his order or action of May 10, 1909, and directed that the contest case of relator (*Knight* v. *Waters*) pending before the Commissioner to the Five Civilized Tribes, and which had never been heard or decided, should be proceeded with, considered and disposed of on its merits, and thereafter directed that the money which had been deposited on behalf of the relator should be returned to the party depositing it (R., 19).

74861—13——3

Thereafter, and on July 19, 1909, the contest was decided by the Commissioner to the Five Civilized Tribes:

> The said relator having theretofore regularly appeared and been represented by counsel in said contest, and thereupon, and after the hearing of proof and evidence with reference to the respective matters and issues raised in said contest, the Commissioner to the Five Civilized Tribes did duly and regularly, and in all respects in manner and form in accordance with law, decide said contest and the issues therein against the said relator and in favor of the said Eva Waters, and awarded said lands involved in said contest * * * to the latter, and denied any right in the said relator thereto. (R. 31.)

In accordance with the rules of practice, the relator was allowed 30 days within which to appeal from the said decision of the Commissioner to the Five Civilized Tribes (R., 9, 31), but he failed and refused to take any such appeal or any proceedings toward having reviewed the decision of the said commissioner, and that decision, on August 18, 1909, became final (R., 31). Thereafter, and on August 27, 1909, in the ordinary course of business, a deed duly executed as required by law, and duly approved by the Secretary of the Interior, was recorded and delivered to the said Eva Waters, conveying to her the full and complete title in and to the real property here in controversy (R., 31, 114).

This suit was commenced July 16, 1909 (R., 1), on the same day that the relator first appeared before the Commissioner to the Five Civilized Tribes in the trial of *Knight* v. *Waters* and protested against further proceedings therein (R., 28).

It further appears from the record on the motion to dismiss or affirm that relator Knight has, since the commencement o this suit, abandoned his contest for the lands involved herein by application for allotment for other lands, which have been duly allotted to him to the exclusion of the lands involved herein and in full satisfaction of his allotment right. (Motion 1, 10, and appendix to motion.)

Section 60 of the act of July 1, 1902, *supra*, reads as follows:

> Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment.

We call particular attention to this section and to the facts just related that, since the commencement of the action, the land in controversy has been patented to Waters, and that the relator himself has applied for and had patented to him other land in satisfaction of his allotment right. For this clearly leaves the case a moot one, if not on the merits, then surely on the motion to dismiss or affirm; for not only has the land in controversy passed beyond the jurisdiction of the Secretary of the Interior, but

the relator, by his own action in applying for and receiving an allotment and patent of other land, has, by virtue of section 60, above quoted, become estopped and has fully assented to the allotment and conveyance of the land in controversy to Waters, and has relinquished all of his right, title, and interest in the same.

Pending the suit, relator took various depositions in an attempt to support certain issues of fact raised by him. (R., 33.) The testimony in these depositions is mostly as to the value of the land in controversy, and the trial court declined to admit the depositions to be read in evidence. (R., 116.)

THE CONTENTION OF RELATOR.

Upon this record the contention of the relator is that by the action taken by the Secretary on May 10, 1909, and May 11, 1909, and the mere execution of the deed by the principal chief of the Cherokee Nation, the jurisdiction of the Secretary of the Interior had become exhausted, his power and discretion had ceased, the relator became the owner of the land and was entitled to have the deed approved by the Secretary of the Interior and recorded and delivered to him, and he asks that, by mandamus, the Secretary be commanded "forthwith to deliver to your relator said deed properly recorded as required by law in such cases, and to do and perform all other acts and things in the premises as the law may require." (R., 4.)

This statement of the contentions of relator, as well as that part of the argument here following which

refers to and answers points made by relator, are based upon his brief in opposition to the motion to dismiss or affirm; no brief on the writ of error has yet been filed or served by relator.

ARGUMENT.

I.

No jurisdiction in the courts to interfere by mandamus.

Putting aside from consideration the fact that there is naught here else a moot case, we respectfully urge that the judgment below be affirmed by the application of those principles announced in the opinion of this court in the case of *United States ex rel. Ness* v. *The Secretary of the Interior*, 223 U. S. 683. The following is from the syllabus:

> Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with *quasi* judicial functions, to which is confided the execution of the laws regulating the disposal of the public lands.
>
> A decision of an executive officer, made in the discharge of a duty imposed by such a law, and involving the exercise of judgment and discretion, may not be reviewed by mandamus, nor can he be compelled by that means to retract his decision so made and to give effect to another not his own and having his approval.

As in public land matters, just as surely and as certainly has Congress conferred upon the Secretary

of the Interior full and exclusive jurisdiction in the allotment of lands among the qualified members of the Five Civilized Tribes. This clearly appears from the legislation as a whole and we have particularly shown it by the above quotations therefrom, by the opinion of the Attorney General, *supra*, and the decisions of this court in *West* v. *Hitchcock*, *supra*, and *Ballinger* v. *Frost*, *supra*. Indeed, relator conceded this jurisdiction, invoked its exercise, and does not complain that he was at any time denied due process of law and a full and fair hearing. This duty and jurisdiction involves the exercise of judgment and discretion. The courts will not interfere by mandamus to coerce the judgment of the Secretary in the exercise of his jurisdiction and the performance of his duties. The action of the Secretary in the case at bar was not arbitrary nor was it merely ministerial, but it was taken in the exercise of judgment and discretion conferred by law; and it is not controllable by mandamus.

As we have seen, Eva Waters applied for the land in controversy as a part of her allotment. Relator claiming adversely the same land, instituted a contest in the manner authorized by the rules of practice. Those acting in what was supposed to be the interest of Eva Waters asked leave to confess judgment in favor of the relator. That was the matter before the department May 10, 1909. The Secretary, on the evidence before him, decided to permit Waters to withdraw. The rules provide for motions to reinstate, or motions for rehearing or review. If

the action of the Secretary of May 10, 1909, and May 11, 1909, constituted a "final order or decision," the party affected had 30 days within which to file a motion to secure a reconsideration of the order, or decision. Rule 22 (R., 9) provides that failure to file such a motion operates to close the case; conversely, the case would not be closed until the expiration of 30 days.

If, on the other hand, the action of May 10, 1909, and May 11, 1909, is not to be regarded as a final order, or decision, disposing of the contest case, it necessarily follows that it has no more potency than any interlocutory order, subject to modification or revocation for cause shown to the officer making the order.

> Until the matter is closed by final action, the proceedings of an officer of a department are as open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review on the final hearing. *New Orleans* v. *Paine*, 147 U. S. 261, 266; *Michigan* v. *Rust*, 168 U. S. 589, 594; *Beley* v. *Naphtaly*, 169 U. S. 353, 364.

Within 30 days a motion for rehearing was duly filed by Waters and entertained with the result that the order or decision was vacated. Automatically, the contest case, which was still pending dormant during the 30-day period, revived, and the contestant (relator) was bound to appear and present his case or invite the penalty prescribed by Rule 14 (R., 8). As a matter of fact, he appeared by counsel at the

hearing before the Commissioner to the Five Civilized Tribes on July 16, 1909. He states, in effect, in his replication, that he was there for the purpose of protesting against the trial. The trial culminated July 19, 1909, in a judgment in favor of Waters and adverse to the claim of relator. The land was awarded to Waters because the issues raised by relator in his contest proceeding against her were regularly resolved in her favor by the only tribunal having jurisdiction, and in the only manner provided by law.

Relator had the right to appeal within 30 days. The 30 days expired August 18, 1909. Relator failed to appeal and the decision in favor of Eva Waters became final and conclusive.

So we have shown the law, and the regularity of the proceedings within the law. The Secretary had the jurisdiction, and he acted within that jurisdiction, at all times according to due process of law. There was nothing arbitrary, nothing capricious, but in everything conscientious and in the exercise of his discretion and judgment.

There are many sufficient reasons why the Secretary might have revoked his action of May 10, 1909. It is not necessary for him to disclose them to the court. He had exclusive jurisdiction to decide the whole matter. He comes here now and says that after having afforded all parties due process of law and having heard them and their contentions, he disposed of the case in a certain manner. Relator quarrels with the decision and complains that it should have been different. He asks the court to go

back of the whole thing, usurp the functions of the Secretary of the Interior, take relator's view of the situation, and compel the Secretary to render a judgment wholly at variance with his conclusions as to the law and the facts. Mandamus was not invented for such a thing.

Assuming that the Secretary had the power to dispose of the matter in the manner indicated by him on May 10, 1909, he certainly had the power to set that order aside on motion duly presented if he decided that his former conclusions were erroneous; that, for instance, the amount to be paid Waters was wholly insufficient. On the other hand, he may have concluded that he had no power to dispose of the case as he therein indicated he would—that such action would be entirely unsupported by statutory authority, and, thus believing, set aside the order or action.

United States ex rel. West v. *Hitchcock, supra*, was mandamus against the Secretary of the Interior, and involved the allotment of Indian lands. The court there said, referring to the Secretary:

> Furthermore, as his decision is not a matter of any particular form his answer saying that he has decided the case is enough; for even if he had not decided it before, such an answer would announce a decision sufficiently by itself.

Further:

> If the Secretary had authority to pass on the relator's right to select land, his jurisdiction did not depend upon his decision being

> right. By alleging that he had denied the application he did not invoke the revision of his reasons by a court, even when he saw fit to add the date. He raised no question of law, but simply stood on his authority and put forward his decision as final. As we have implied, such an answer affirms not merely the past but the present determination of the answering tribunal, and must be assumed to be based on reasons that the respondent deems adequate. Even if those given in the letter of July 3, 1901, had been bad, they could not be taken to exhaust the Secretary's grounds. He has not disclosed to the court any statement of those grounds purporting to be exhaustive and complete, and the court can not make an inquisition into his mental processes to see whether they were correct.

Moreover, when this suit was commenced, relator's contest, duly initiated by him against Waters, was proceeding regularly before the Commissioner to the Five Civilized Tribes. It had not yet been decided by him. We thus see an attempt not only to coerce the Secretary of the Interior in his action upon a matter within his jurisdiction, but one to disturb the regular and orderly proceedings in the Department of the Interior in such matters, proceedings which relator himself had invoked—but, more than that, an attempt to compel him to act before the matter had properly reached him for his consideration—before he was in a position act, under the very rules invoked and proceeded nder by relator.

Therefore we respectfully urge that the case is wholly controlled by the decision of this court in *United States ex rel. Ness* v. *The Secretary of the Interior, supra.*

Furthermore, the United States has a reversionary interest in the lands of the Cherokees: Act of May 28, 1830 (4 Stat. 411); *Heckman* v. *United States*, 224 U. S. 413, 430, 431; section 59, act of July 1, 1902, *supra*. While that title remains in the United States and the proceedings for acquiring it are still *in fieri*, the courts are without power, by mandamus or otherwise, to control the judgment and discretion of the officers of the Land Department in respect of the disposition of such lands under the public-land laws: *United States* v. *Schurz*, 102 U. S. 378, 396; *Knight* v. *Land Association*, 142 U. S. 161; *Brown* v. *Hitchcock*, 173 U. S. 433, 476-8; *United States ex rel. Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473.

It would seem also that the United States is an indispensable party, and since there has been no waiver on its part of immunity from suit, the courts have no jurisdiction: *Oregon* v. *Hitchcock, supra; Naganab* v. *Hitchcock, supra; Heckman* v. *United States, supra.*

II.

Deed of principal chief of no avail.

But, relying upon the case of *Ballinger* v. *Frost*, 216 U. S. 240, it is urged by relator that the principal chief of the Cherokee Nation executed a deed to relator at some time subsequent to May 11, 1909, the date not being disclosed. It appears, however, from the pleadings that this deed was never approved by the Secretary, as required by law (section 59 of the act of July 1, 1902, *supra*); nor was it ever recorded or delivered. The purpose of this suit is to compel the Secretary to record and deliver it.

No title has passed to the relator; not even the equitable title by the issuance of an allotment certificate. It is conceded that he never received an allotment certificate. Nor has the legal title passed, because section 5 of the act of April 26, 1906, *supra*, requires the recordation of the patent in the office of the Commissioner to the Five Civilized Tribes, "and when so recorded it shall convey the legal title;" under which the patent is to be delivered to the allottee.

This case is wholly unlike *Ballinger* v. *Frost*, *supra*. In that case the relator had been properly enrolled, and the land selected was properly subject to allotment to her; there was no contest, and the validity of the allotment was not assailed; her rights under the allotment had vested and was evidenced by allotment certificate regularly issued and by patent executed by the principal chief, ready for delivery to the

allottee, when the Secretary changed his mind as to the suitability of the land for town site purposes and undertook to set it apart as a town site. It was in pursuance of this purpose that he refused to deliver to Belle Frost the patent. Moreover, this was in 1905, prior to the change in the law making the recording of the patent the act which passed the legal title.

It was not decided in the *Frost* case that the Secretary, after enrollment and after having issued a certificate of allotment, may not strike the name of the Indian from the roll and set aside the allotment after giving due notice of his intended action and an opportunity to be heard. In the later case of *United States ex rel. Lowe* v. *Fisher*, 223 U. S. 95, this last question was before this court, and it was specifically held that, notwithstanding enrollment and the issuance of an allotment certificate, the Secretary was authorized, upon notice and after hearing, to strike the name from the roll and set aside the allotment in a case of fraud or mistake, and cited in support thereof *Hawley* v. *Diller*, 178 U. S. 476, 490, in which case it was further held that a grantee of the person holding such an equitable title from the United States was not a *bona fide* purchaser—not an innocent purchaser.

Although the *Frost* case was urged on the court in argument in the *Lowe* case, the court there did not find it at all necessary to refer to it. When the *Lowe* case was in the Court of Appeals of the District of Columbia, that court took occasion to dis-

tinguish the *Frost* case. *Lowe* v. *Ballinger*, 35 App. Cas. D. C. 524.

The decision of this court in the *Lowe* case is important in connection with the point made, *supra*, that the action of the Secretary, May 10, 1909, and May 11, 1909, was subject to his review upon a showing of fraud or mistake.

The purpose of the suit in the *Frost* case was not to secure the doing of an act by which title would pass, but to secure the perfecting of a transaction in which the mere ministerial duty of delivering the muniment of legal title alone remained to be performed; but in the case at bar the purpose is to secure the doing of an act whereby title itself will pass—the relator having neither the equitable nor the legal title unless the court, by legislation, shall apply, retroactively, a mode of passing title not known to the statutes. For Congress has provided a means of passing equitable title—the allotment certificate never issued to relator; and the means of passing legal title—a deed approved, as an exercise of judgment and discretion, by the Secretary, and recorded, neither of which actions have ever been performed in favor of relator; but both of which, in his discretion and within his jurisdiction, have been denied by the Secretary.

III.

A moot case.

As hereinbefore related in the facts of the case, and as was brought to the attention of the court by the supplemental answer (R., 31), and by the introduction of the patent in evidence (R., 114), the contest initiated in the Land Department by relator proceeded to a final judgment, was decided adversely to relator, and the lands were duly patented to Eva Waters, thus conveying to her the title of the Cherokee Nation and of the United States to the land in controversy, which title was absolute and unrestricted (act of May 27, 1908, 35 Stat. 312), and removing the land from the jurisdiction or control of the United States or any officer thereof, and leaving nothing for a judgment in favor of relator (if such a thing were possible) to operate upon. The case, therefore, became a moot one and the judgment of the court was for that reason, if for no other, correct, and should be affirmed or the appeal dismissed.

In addition to this, as showing that the relator himself by his conduct has made it necessary to dismiss the appeal or affirm the judgment, we refer to what has been said on pp. 11, 12, *supra*.

IV.

The supplemental answer.

Considerable emphasis is laid by counsel for the relator upon the proposition that by filing the "supplemental answer" defendant in error abandoned his main defense, on the theory that such "supplemental

answer" is in the nature of, or is, a plea *puis darrein continuance*, eliminating every issue except that presented by the plea. Whether in common law pleading that be ordinarily or commonly the effect of such a plea, we respectfully submit is of little moment here. It is conceivable, in an action in assumpsit where the defendant pleads *non assumpsit* and after issue joined comes in with a plea *puis darrein* setting up a new and wholly inconsistent defense, tantamount to an admission of the original cause of action but avoiding judgment on some other ground, that relator's theory of the effect of the plea *puis darrein* should obtain.

But this is a suit for mandamus, to which, in the District of Columbia, at least, the ordinary pleading is inapplicable. The respondent does not plead to the petition, but responds to the rule to show cause. This was so held in *United States ex rel. West* v. *Hitchcock*, 19 App. D. C. 333, where, on appeal from an order sustaining respondent's demurrer to the petition and dismissing the petition, the court reversed the order and remanded the cause for proceedings consonant with the court's idea of the requirements of law in respect to pleading.

The court held that the Statute of 9 Anne, ch. 20, equally with the District Code, contemplates a return or answer to the rule or writ—the process issuing out of the court—and not a demurrer to the petition, the answer stating all the facts upon which respondent proposes to rely. Relator, in his petition, relates his troubles to the court, whereupon the

sovereign on such relation commands the respondent to appear and show cause why the writ should not issue. The giving of the writ is purely discretionary, not a matter of right. The court is not an umpire, deciding a right as between private individuals. The real issue is the duty of the respondent, the question of *right* lying between him and his sovereign. On the relation of the complaining party, apparently the right of the sovereign has been outraged—his subject and servant, a public officer, has failed in the performance of a duty. So far as pleadings are concerned, the respondent is called to account by the sovereign, not by the relator. Thus, the respondent's answer is to the court, and he is bound to place in the possession of the court every fact that will aid the latter in the exercise of its discretion; and before that judgment is exercised it would seem that the duty of the respondent, probably the relator also, in this respect continues.

There is no inconsistency between the original and the supplemental answers in the case at bar. The latter relates in logical sequence the happenings presaged by the former. The original answer informed the court of the pendency of the proceedings in the department, to which relator and Eva Waters were parties. Under the law and the regulations, judgment in favor of Eva Waters in the contest case would become final in thirty days from rendition, whereupon, pursuant to the judgment, an allotment certificate was bound to issue, and under the law

patent was to follow. (Act of July 1, 1902, *supra*, secs. 58–62; act of April 26, 1906, *supra*, sec. 5.) There was no writ of prohibition or injunction interfering with the orderly course of administration, the department owing a duty to Eva Waters precisely as much as it did to relator. So these things were done—and the supplemental answer properly so informed the court. The court had a right to know, and should have been advised, because the writ being discretionary, it might be moved by the futility of issuing mandate in disposing of the matter. The information was before the court for what it was worth. The court might still have acted affirmatively in response to relator's prayer if it thought that to be a wise disposition of the cause in the light of all the facts; the point is that it was bound to act knowingly, in full possession of every material fact that would guide it in the exercise of its discretion. That information was before the court in the only orderly way in which it might be presented—by a further answer to the rule. A supplemental answer included the new facts that had occurred.

Relator initiated a proceeding before the Land Department. At the threshold of the proceedings he suddenly attempts to transfer it to a court by mandamus, and then complains because the proceeding in the department is regularly concluded and the Secretary comes in and lays the facts before the court for its consideration—tells the whole of the story.

From the record, however, it clearly appears that there is no basis whatsoever for this point, or contention, of the relator. Rule 32 of the rules of practice of the Supreme Court of the District of Columbia provides:

> If a matter of defense has arisen since the last pleading filed, the party may plead the same in addition to his former defense. * * * the plaintiff shall reply within five days after service of such plea; and the defendant shall rejoin within two days after the service of the replication.

Defendant having filed the supplemental answer without first obtaining leave of court, the relator made a motion to strike the same from the files for the reason that leave had not been obtained; the court thereupon, upon motion of defendant, granted leave to file the supplemental answer on September 1, 1909, *nunc pro tunc*. The supplemental answer having been filed, as above stated, to set forth a defense which had arisen since the last pleading filed, and to show to the court all of the facts in the case for its consideration, it must in view of the above rule, be assumed that the filing of the answer and the order of the court were made so that the defendant might "plead the same *in addition to* his former defense." However, it is very clear that this is exactly what defendant did, for he says in his supplemental answer (R., 31):

> Comes now Frank Pierce as First Assistant Secretary of the Interior and in pursuance of

law acting as Secretary thereof in the absence of Richard A. Ballinger, Secretary of the Interior, and here *reiterating, reaffirming, and reasserting all, each and every of the matters and things set forth in his answer heretofore filed in the above entitled matter* by way of supplemental answer, alleges, etc.

So, it will be seen that the pleading, not only under the rule but as a matter of fact, was, in addition to the former defenses, especially reiterating, reaffirming, and reasserting all of them.

Moreover, the supplemental answer pleads other very material facts of which relator does not complain; he lays stress on the fact that the issuance of the patent to Eva Waters made performance impossible, and that this is not a competent defense. But the supplemental answer sets forth other matters—it continues the history of the matter (initiated by relator) as set forth in the former pleadings, and relates that the contest between relator and Eva Waters was heard before the Commissioner to the Five Civilized Tribes, and that the relator appeared and was represented thereat by counsel, and that the commissioner decided the case in favor of Eva Waters; that that judgment was rendered on the 19th day of July, 1909, and that the time to appeal therefrom under the rules expired in 30 days, and that the judgment became final on the 18th day of August, 1909, because the relator failed to take any such appeal. Therefore, eliminating from consideration that part of the supplemental answer which alleges

the execution, approval, and delivery of the deed to Eva Waters, and even that portion making a part thereof all of the matters and things set forth in the prior answer, there is still enough in the supplemental answer, when considered with the petition of the relator, to sustain the judgment of the lower court, as is pointed out in our argument, *supra*.

V.

Impossibility of performance.

No little insistence is laid by relator upon the proposition that an act of the defendant rendering impossibility of performance is not competent as a defense.

It is not so much the *impossibility* of performance caused by the act of the defendant in error as it is the *futility* of performance. The prayer of the petition is for a mandamus to compel the Secretary to deliver a deed which has not been approved by him as required by law—an act wholly discretionary and solely within his jurisdiction to determine whether he will or will not perform—and that said deed, so delivered, must be "properly recorded as required by law in such cases." Now, as we have seen, the act of April 26, 1906 (34 Stat. 137), provides (sec. 5) that patents (or deeds) covering allotments shall be recorded in the office of the Commissioner to the Five Civilized Tribes, "and when so recorded shall convey legal title," etc. On August 27, 1909 (R., 31, 114), exactly such a deed as the

statutes require—executed by the principal chief, approved by the Secretary, to pass the reversionary interest of the United States—sec. 59 of act of July 1, 1902 (32 Stat. 716), duly recorded in the office of the Commissioner to the Five Civilized Tribes—was delivered to Eva Waters. The legal title of the Cherokee Nation and the title of the United States, by the recordation of the last-mentioned deed, passed to Eva Waters, under the law. Whatever may be thought or said of the circumstances under which the defendant in error aided, or caused, this passing of the title, in fact and in law it has passed. In face of this fact, of what avail, at this time, would be compliance with the prayer of the petition? True, the Secretary may be compelled to record and deliver the instrument as prayed in the petition; it is not impossible. But—*cui bono?* It is not the province of the court to pass title out of the Cherokee Nation and the United States to an allottee; Congress has provided the means and has designated the parties by which that must be done. It can not order the Secretary to *convey* property in dispute between rival claimants to one of the claimants, for that would be an invasion of the secretarial jurisdiction. At the most it could comply with the request of the relator and issue mandate pursuant to the prayer—for what it is worth.

But it is an elementary principle, in according the writ of mandamus, wholly discretionary with a court, to consider the usefulness of the mandate. If fruitless, it will not issue. It will not go where there is

no necessity and when it would be ineffectual; nor to disturb official action where it will create disorder and confusion, with no resulting benefit to relator. It will not be granted to enforce a mere abstract right, where practically no benefit would result to the party seeking the remedy. It would seem wholly unnecessary to cite authorities to this court on this elementary principle in the law of mandamus. The text asserting it in 26 Cyc. 147, High Extra. Leg. Rem., 3d ed., sec. 14, Spelling, Inj. and Extra. Rem., 2d ed., secs. 1377, 1439, is amply supported by the authorities therein referred to, and this court lately had occasion to follow the principle in *United States ex rel. Turner* v. *Fisher*, 222 U. S. 204, 209.

Now, if by all that was done or recited in relator's petition to have been done, passed title to relator, albeit a deed or patent to another person apparently fixes the legal title in that other person, the mere transfer of a paper which will show on its face that the requirements of law have not been met, will not in the slightest degree affect relator's title. If it did, the mandate of the court would be an encroachment upon the Secretary's jurisdiction. The vital question after all is whether relator or Eva Waters has title to the land; relator, by reason of what he avers in his petition; Eva Waters, by reason of what is set up in the supplemental answer. This is a matter, then, between relator and Eva Waters, and a matter to which the more ordinary juridical remedies apply—a suit against Eva Waters, the possessor of a deed in all respects conformable to the law, to erect a trust

in relator's favor—a suit between the parties in the State where the land is situate. The writ of mandamus here will have no effect there; nor is it necessary, if relator's contentions be correct. His writ here is maintainable only upon the proposition that the Secretary had exhausted his judicial functions by passing title to him before he, the Secretary, attempted to convey the land to Eva Waters, and that therefore the ministerial duty of delivering the muniment of title alone remains. The court here can not say, in the absence of Eva Waters, that relator, not Eva, is the owner of the legal title to land situate elsewhere. Neither can it say that relator, rather than Eva, *should* be the owner: for that would be either an invasion of the defendant's jurisdiction originally, or an attempt to review and reverse his action taken in the matter within his jurisdiction (argument, *supra*). In short, relator either has title now or he has not; if he has not, the court can not interfere; if he has, there is no occasion for its interference here, as in any aspect, in the light of the facts disclosed by the supplemental answer, it is obvious that he has a remedy in a court of the vicinage to which he must ultimately resort in a suit between him and Eva Waters. To repeat: If he has no title, the court should not interfere; if he has title, the court need not interfere to order the doing of a vain thing that will not add or abate a tittle to or from his title.

VI.

Eva Waters indispensable party.

When relator insists that the supplemental answer does not state a defense, because the things which are therein stated defendant in error has done make performance impossible, he must necessarily mean that the things which are therein stated to have been done passed the legal title to Eva Waters. It would thus seem that what relator is really trying to do here is to quiet his title to this land. Moreover, Eva Waters may have conveyed the land, which she had a perfect right to do. Act of May 27, 1908 (35 Stat. 312).

It would therefore seem that she and her grantees, if there are any, are necessary if not indispensable parties to this suit. This court has held ever since the early cases of *Shields* v. *Barrow*, 17 How. 130, and *Cairon* v. *Millaudon*, 19 How. 113, that the Federal courts are not able to make a decree in any suit in the absence of an indispensable party whereby his interests can be affected, and no suit can proceed in the absence of such necessary parties. Relator, therefore, should have brought in Eva Waters when the fact of her title appeared in the pleadings. When he failed to do so, judgment was properly rendered against him.

VII.

Land and remedy is in Oklahoma.

The lands involved are situated in the State of Oklahoma without the territorial jurisdiction of the court where this suit was commenced. As stated before, appellant has a remedy if he has sustained a

wrong; he claims the title; he can endeavor to impress Eva Waters' deed with a trust by a proceeding in the Oklahoma courts. He requires no "deed" from the defendant to enable him to maintain such an action. If he received such a "deed" no one would recognize its validity or force until by proper proceedings in an Oklahoma court he had established its effectiveness. An elementary principle governing the issuance of the writ of mandamus is the fact that no other effective remedy obtains to insure relator the enjoyment of his alleged right. Relator, in this case, wants the land, not a naked deed. There is a way and a place where he can secure the land if it really belongs to him. The place is Oklahoma, and the way is not a proceeding in the District of Columbia for a writ of mandamus.

VIII.

CONCLUSION.

The motion to dismiss or affirm is before the court for its consideration, and we believe that on that motion the writ of error should be dismissed.

However, if that be not done, the court now has the cause before it on its merits, and it is respectfully submitted that the judgment of the court below should be affirmed.

WM. MARSHALL BULLITT,
Solicitor General.

CHARLES W. COBB,
Assistant Attorney General.

JANUARY 27, 1913.

○

UNITED STATES EX REL. KNIGHT *v.* LANE, SECRETARY OF THE INTERIOR.[1]

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 163. Argued March 5, 6, 1913.—Decided March 17, 1913.

Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department. *Brown* v. *Hitchcock*, 173 U. S. 473.

Until the matter is closed by final action the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing. *New Orleans* v. *Paine*, 147 U. S. 261.

A decision of the Secretary of the Interior revoking his prior approval of an adjustment between contestants, one of whom is a minor, and which is not arbitrary or capricious, but given after a hearing and in the exercise of the discretion confided to him by law, cannot be reviewed, nor can he be compelled to retract it, by mandamus. *Ness* v. *Fisher*, 223 U. S. 683.

The power given by the act of July 1, 1902, providing for allotment of Cherokee lands in severalty, to the Secretary of the Interior to decide between contestants, is not exhausted by a decision approving a settlement and directing deeds to be submitted to him for approval. Such a decision is interlocutory and not final and power still remained to reconsider and revoke.

35 App. D. C. 429, affirmed.

THE facts, which involve the construction of the act of Congress allotting Cherokee lands in severalty and the power of the Secretary of the Interior thereunder to determine contests and to reconsider his decisions thereon, are stated in the opinion.

[1] Original docket title United States ex rel. Knight *v.* Richard A. Ballinger, Secretary of the Interior, subsequently changed to Same *v.* Walter L. Fisher, Secretary &c. and subsequently changed to Same *v.* Franklin K. Lane, Secretary &c.

Mr. Frederic D. McKenney, with whom *Mr. James W. Zeverly*, *Mr. James M. Givens* and *Mr. Richard Wm. Stoutz* were on the brief, for plaintiff in error:

The execution by the principal chief of the Cherokee Nation of the patent in favor of Knight, under the circumstances of this case, rendered the issuance of an allotment certificate unnecessary. The patent itself contained within its four corners all pertinent recitals of such a certificate and in addition the appropriate words of grant and conveyance necessary to vest in the patentee title to the lands described. The patent being at least equal in legal potency to and certainly of greater dignity than an allotment certificate, the execution and delivery of the former by the principal chief materially advanced the mutation of title to the lands described therein beyond the point usually indicated by the issuance of the latter. In the absence of fraud or mistake, and neither is shown to have had existence in these proceedings, the rights of the patentee in and to the land became fixed and vested, and thereafter the Secretary of the Interior had but the ministerial power and duty of effecting the recordation and delivery of the patent, "a duty which, within all the definitions, can be enforced by the writ of mandamus." *Ballinger* v. *Frost*, 216 U. S. 240.

As in *Frost's Case* so in the case at bar, the authorities especially and exclusively empowered by the pertinent acts of Congress had executed under the great seal of the Cherokee Nation a patent for the lands embraced therein to Knight.

As in *Frost's Case* so in the case at bar nothing remained to be done by the Secretary but the purely perfunctory and ministerial duty of noting his "approval" thereon and seeing that it was duly delivered to the patentee. See *Garfield* v. *Goldsby*, 211 U. S. 249; *Roberts* v. *United States*, 176 U. S. 221; *Noble* v. *Union River Logging Co.*, 147 U. S. 165; *Frasher* v. *O'Connor*, 115 U. S. 112; *Butter-*

worth v. *Hoe*, 112 U. S. 50; *United States* v. *Schurz*, 102 U. S. 378; *Barney* v. *Dolph*, 97 U. S. 652.

In view of the circumstances and particularly in view of the large sums of money paid to and remaining in the possession of the Commission to the Five Civilized Tribes for the benefit of the minor, and the other large sums expended upon the strength of the Secretary's decision, and his telegram of instructions in improving and developing the lands by erecting derricks and drilling for oil, the present case, while equally as strong in point of law as any one of the cases above cited, excels them in all that strength which equity and good faith add.

Mr. Assistant Attorney General Cobb, with whom *Mr. Solicitor General Bullitt* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This writ of error brings up for review a judgment of the Court of Appeals of the District of Columbia (35 App. D. C. 429) affirming a judgment of the Supreme Court of the District refusing a writ of mandamus commanding the Secretary of the Interior to deliver to the relator a patent for a tract of land claimed by the latter as a Cherokee allotment. The facts upon which the decision must turn are these:

On August 21, 1907, a parcel of allottable land containing 50 acres, in the Cherokee Nation, was selected as an allotment for Eva Waters, a minor Cherokee child belonging to the class whose rights to participate in the distribution and allotment of the tribal funds and lands were sustained in the recent decision in *Gritts* v. *Fisher*, 224 U. S. 640. A week later William Twist and the relator, Herman Knight, enrolled Cherokees, respectively selected the westerly 20 acres and the easterly 30 acres of the same

tract as allotments for themselves, and in furtherance of their selections instituted contests against that of Eva Waters. A hearing on Twist's contest resulted in a decision in his favor by the Commissioner to the Five Civilized Tribes. On an appeal to the Commissioner of Indian Affairs that decision was reversed, and a further appeal carried the contest before the Secretary of the Interior. Knight's contest was held in abeyance, before the Commissioner to the Five Civilized Tribes, awaiting the outcome of Twist's. In this situation negotiations were had between representatives of Twist and Knight and the parents of Eva Waters, acting in her behalf, looking to a withdrawal of her selection, subject to the approval of the Secretary of the Interior, in order that there might be no obstacle to the allowance of the later selections of Twist and Knight. The negotiations resulted in an application to the Secretary for permission to effect such an adjustment of the two contests on the payment, for the use of the minor, of an adequate consideration for her potential interest in the land. After a hearing on this application the Secretary, on May 10, 1909, rendered a decision approving the proposed adjustment on condition that there be paid, for the use of the minor, $10,000 for her claim to the 20 acres in Twist's contest and $15,000 for her claim to the 30 acres in Knight's. The Secretary then sent to the Commissioner to the Five Civilized Tribes the following telegram: "Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty-five thousand dollars for use of minor Waters, contestants given including fifteenth to make payment. . . . Prepare deeds to respective contestants and have them executed and forwarded here for approval. Report promptly by wire." Within the time named the $25,000 was paid to the Commissioner, for the use of the minor, and thereupon patents to Twist and Knight were executed by the principal chief

of the Cherokee Nation and were forwarded by the Commissioner to the Secretary for his approval.

Under the regulations governing the institution and disposition of contests over allotments a party was accorded thirty days after a decision by the Secretary within which to apply for a rehearing. Within this period the parents of Eva Waters, acting in her behalf, applied to the Secretary for a rehearing of the matter covered by his decision of May 10, 1909, it being asserted in that connection that her potential interest was worth much more than the sum named in the decision, and that her parents' consent to the adjustment had been grounded on inaccurate and misleading information. The application was entertained, and, after a hearing thereon in which Twist and Knight participated, the Secretary rendered a further decision vacating the former one and disapproving the proposed adjustment, on the ground that the consideration which the minor was to receive was not at all adequate. The Secretary also ruled that both contests should be considered and disposed of on their merits and that the $25,000 should be returned. The money was not actually repaid, but this may have been because those who paid it were as yet unwilling to take it back. In consequence of his later decision the Secretary declined to approve the patents executed by the principal chief, or to permit them to be recorded or delivered.

On July 16, 1909, Knight's contest was called for hearing before the Commissioner to the Five Civilized Tribes in pursuance of the Secretary's direction that it be considered and disposed of on its merits, and Knight then appeared and protested against any further steps therein, insisting that in virtue of the matters here recited he had acquired a fixed and absolute right to the patent and that the administrative officers were without authority to proceed with the contest. The protest was disregarded, and on the same day he applied to the Supreme

Court of the District of Columbia for a writ of mandamus, as before indicated, to compel the Secretary of the Interior to deliver to him the patent for the 30 acres and to perform any other acts necessary to clothe him with the full legal title.

The question for decision is, whether in the circumstances the Secretary was without authority to reconsider and vacate his decision of May 10, 1909, approving the proposed adjustment of the relator's contest, whereby the minor, Eva Waters, was to withdraw her selection in consideration of the payment by the relator of $15,000 for her use. It is frankly conceded by counsel for the relator, and rightly so, that the adjustment could not have been made without the Secretary's approval, which means that he possessed a power of decision in the matter. The act of July 1, 1902, 32 Stat. 725, c. 1375, under which the Cherokee lands were being allotted in severalty, shows that Congress was solicitous not only that every member of the tribe should receive an allotment (§§ 11, 16), but that the rights of minors should be specially asserted and conserved (§ 70). And that it was intended to clothe the Secretary with comprehensive powers is shown in the provisions that all matters relating to allotments should be determined under his direction (§ 22) and that all things necessary to carry into effect the provisions of the act, not otherwise therein specifically provided for, should be done under his authority and direction (§ 65). The question therefore is reduced to this: Was his power of decision exhausted when on May 10, 1909, he approved the proposed adjustment? To this there can be only a negative answer. That decision was not final, but interlocutory. In terms it shows that the patent was not to be effective or delivered until he approved it, and the act of 1902 declared that it must have his approval (§ 59). Not only so, but, no statutory provision opposing, effect was to be given to the regulation providing for rehearings

and allowing thirty days within which to apply therefor. Thus, it was as if the decision itself had made provision for a rehearing. Proper regard must also be had for the fact that the act of April 26, 1906, 34 Stat. 137, c. 1876, § 5, expressly contemplated that the title should not pass until the patent was recorded in the office of the Commissioner to the Five Civilized Tribes. In such a case we perceive no reason for departing from the rule applicable to kindred proceedings in the Land Department, which is well stated in the following excerpts from the opinion in *Brown* v. *Hitchcock*, 173 U. S. 473, 476–478:

"Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department. In *United States* v. *Schurz*, 102 U. S. 378, 396, which was an application for a mandamus to compel the delivery of a patent, it was said: 'Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.'

* * * * * * * *

"We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to assert his rights as against a proceeding in the land department or when the department refuses to act at all. *United States* v. *Schurz*, *supra*, and *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165, are illustrative of these exceptional cases.

"Neither do we affirm that the administrative right of the departments in reference to proceedings before them justifies action without notice to parties interested, any

more than the power of a court to determine legal and equitable rights permits action without notice to parties interested.

* * * * * * * *

"But what we do affirm and reiterate is that power is vested in the Departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the Government."

As entirely apposite, we repeat the statement in *New Orleans* v. *Paine*, 147 U. S. 261, 266: "Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing."

Inasmuch as the decision of the Secretary revoking his prior approval of the proposed adjustment was not arbitrary or capricious, but was given after a hearing and in the exercise of a judgment and discretion confided to him by law, it cannot be reviewed, or he be compelled to retract it, by mandamus. *Ness* v. *Fisher*, 223 U. S. 683.

The decisions in *Garfield* v. *Goldsby*, 211 U. S. 249, and *Ballinger* v. *Frost*, 216 U. S. 240, are not in conflict with the views here expressed. In the former the writ was awarded to compel the respondent to erase and disregard an entry which he arbitrarily and without notice had caused to be made upon a public record, thereby beclouding the relator's right to an Indian allotment. In the latter the writ was awarded to compel the delivery of a patent which was withheld solely through the unauthorized action of the Secretary in entertaining and sustaining a proceeding in the nature of a contest after the expiration of the time limited by statute for instituting such a proceeding.

Judgment affirmed.